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REPORTS

OF

John White
1850
515
CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED

John IN THE *White*

SUPREME COURT OF ALABAMA,

During June Term, 1842, and part of January Term, 1843.

BY THE JUDGES OF THE COURT.

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VOLUME IV—NEW SERIES.

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OFFICERS

John OF *White*

THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

HENRY W. COLLIER, CHIEF JUSTICE.

HENRY GOLDTHWAITE, }
JOHN J. ORMOND, } ASSOCIATE JUDGES.

MATTHEW W. LINDSAY, ATTORNEY GENERAL.

JAMES B. WALLACE, CLERK.

A TABLE

CASES REPORTED IN THIS VOLUME

101	102	103	104	105	106	107	108	109	110	111	112	113	114	115	116	117	118	119	120	121	122	123	124	125	126	127	128	129	130	131	132	133	134	135	136	137	138	139	140	141	142	143	144	145	146	147	148	149	150	151	152	153	154	155	156	157	158	159	160	161	162	163	164	165	166	167	168	169	170	171	172	173	174	175	176	177	178	179	180	181	182	183	184	185	186	187	188	189	190	191	192	193	194	195	196	197	198	199	200	201	202	203	204	205	206	207	208	209	210	211	212	213	214	215	216	217	218	219	220	221	222	223	224	225	226	227	228	229	230	231	232	233	234	235	236	237	238	239	240	241	242	243	244	245	246	247	248	249	250	251	252	253	254	255	256	257	258	259	260	261	262	263	264	265	266	267	268	269	270	271	272	273	274	275	276	277	278	279	280	281	282	283	284	285	286	287	288	289	290	291	292	293	294	295	296	297	298	299	300	301	302	303	304	305	306	307	308	309	310	311	312	313	314	315	316	317	318	319	320	321	322	323	324	325	326	327	328	329	330	331	332	333	334	335	336	337	338	339	340	341	342	343	344	345	346	347	348	349	350	351	352	353	354	355	356	357	358	359	360	361	362	363	364	365	366	367	368	369	370	371	372	373	374	375	376	377	378	379	380	381	382	383	384	385	386	387	388	389	390	391	392	393	394	395	396	397	398	399	400	401	402	403	404	405	406	407	408	409	410	411	412	413	414	415	416	417	418	419	420	421	422	423	424	425	426	427	428	429	430	431	432	433	434	435	436	437	438	439	440	441	442	443	444	445	446	447	448	449	450	451	452	453	454	455	456	457	458	459	460	461	462	463	464	465	466	467	468	469	470	471	472	473	474	475	476	477	478	479	480	481	482	483	484	485	486	487	488	489	490	491	492	493	494	495	496	497	498	499	500	501	502	503	504	505	506	507	508	509	510	511	512	513	514	515	516	517	518	519	520	521	522	523	524	525	526	527	528	529	530	531	532	533	534	535	536	537	538	539	540	541	542	543	544	545	546	547	548	549	550	551	552	553	554	555	556	557	558	559	560	561	562	563	564	565	566	567	568	569	570	571	572	573	574	575	576	577	578	579	580	581	582	583	584	585	586	587	588	589	590	591	592	593	594	595	596	597	598	599	600	601	602	603	604	605	606	607	608	609	610	611	612	613	614	615	616	617	618	619	620	621	622	623	624	625	626	627	628	629	630	631	632	633	634	635	636	637	638	639	640	641	642	643	644	645	646	647	648	649	650	651	652	653	654	655	656	657	658	659	660	661	662	663	664	665	666	667	668	669	670	671	672	673	674	675	676	677	678	679	680	681	682	683	684	685	686	687	688	689	690	691	692	693	694	695	696	697	698	699	700	701	702	703	704	705	706	707	708	709	710	711	712	713	714	715	716	717	718	719	720	721	722	723	724	725	726	727	728	729	730	731	732	733	734	735	736	737	738	739	740	741	742	743	744	745	746	747	748	749	750	751	752	753	754	755	756	757	758	759	760	761	762	763	764	765	766	767	768	769	770	771	772	773	774	775	776	777	778	779	780	781	782	783	784	785	786	787	788	789	790	791	792	793	794	795	796	797	798	799	800	801	802	803	804	805	806	807	808	809	810	811	812	813	814	815	816	817	818	819	820	821	822	823	824	825	826	827	828	829	830	831	832	833	834	835	836	837	838	839	840	841	842	843	844	845	846	847	848	849	850	851	852	853	854	855	856	857	858	859	860	861	862	863	864	865	866	867	868	869	870	871	872	873	874	875	876	877	878	879	880	881	882	883	884	885	886	887	888	889	890	891	892	893	894	895	896	897	898	899	900	901	902	903	904	905	906	907	908	909	910	911	912	913	914	915	916	917	918	919	920	921	922	923	924	925	926	927	928	929	930	931	932	933	934	935	936	937	938	939	940	941	942	943	944	945	946	947	948	949	950	951	952	953	954	955	956	957	958	959	960	961	962	963	964	965	966	967	968	969	970	971	972	973	974	975	976	977	978	979	980	981	982	983	984	985	986	987	988	989	990	991	992	993	994	995	996	997	998	999	1000
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A - TABLE

OF

CASES REPORTED IN THIS VOLUME.

Abram and the State,	273	Bradford and Everly,	371
Adair and Quinn,	315	Brown v. Bailey,	413
Allen v. Mannasse & Mosely,	555	Brazier v. Tarver,	569
Allen v. Allen's Adm'r,	556	Brock et al v. Yongue et al,	584
Alston and Shields,	248	Brown and Long & Long,	622
Alabama Life Insurance & Trust		Bullock and Holmes,	228
Co. and Cunningham,	652	Bush v. Magee,	710
Alabama Life Insurance and Trust		Blair & Morroh and The Pl. and M.	
Co. and Smith,	558	Bank.	613
Andrews and Gibson,	66	Carlisle v. Cahawba and Marion R.	
Austin and Upson,	124	Road Co.	70
Bank Br. at Mobile and Cullum,	21	Cahawba and Marion Rail Road	
Bank Br. at Huntsville v. Marshall,	60	Co. and Carlisle,	70
Bank of the State and Carson,	148	Carter v. Penn,	140
Bank of the State and Woodruff,	292	Carson v. The State Bank,	148
Bank, Pl. and Mer. and Hazard,	299	Carpenter and Magee,	469
Bank, Pl. and Mer. and Crawford,	313	Campbell, use, &c. v. Spence,	543
Bank of the State and Fortune,	385	Caldwell and Lovely,	684
Bank, Pl. and Mer. and Godbold,	516	Caldwell v. Meador,	755
Bank of the State v. Martin & Hun-		Castleberry & Collins v. Fennell,	642
tington,	615	Chilton v. Comstock,	58
Bank, Commercial of Columbus v.		Chilton and Price v. Robbins, Payn-	
Whitehead,	637	ter & Co.	223
Bank of the United States v. Man-		Childress and Beard,	411
sony and Hurtell,	735	Childress et al v. Miller,	447
Bank, Pl. and Mer. v. Leavens,	753	Chambers et al v. Mauldin et al,	477
Bank, Pl. and Mer. v. Blair & Mor-		Clark v. Stringfellow,	353
roh,	613	Cleveland and Durden,	225
Banks v. Lewis,	599	Colton v. Huey & Co.	57
Batre v. Simpson,	305	Comstock and Chilton,	58
Bailey and Brown,	413	Cowling v. Douglass,	206
Bates and Kett,	390	Cope v. Williams,	362
Beauregard v. McRae,	688	Cook and Edgar, Adm'r,	588
Beauregard v. McRae,	342	Covington et al and The State,	603
Beauregard v. McRae,	178	Collins v. Fowler,	647
Beard v. Childress,	411	Cooper and McNair and Wife,	660
Bell v. Crosby & Co.	575	Crawford and Gregg,	180
Bissent et al and Mann,	731	Crosby v. Lassiter,	201
Boughton v. Spear and Pattison,	257	Croft v. Topp,	238
Blount & Stanley v. Traylor,	667	Crawford v. The Pl. and M. Bank,	313
Boyd v. Mynatt,	79	Crosby & Co. and Bell,	575
Bolling & James v. Logan,	169	Cummings & Cooper and Langford,	46
Boraim & Co. v. Da Costa,	393	Curry and Fournier,	321
Booker's Ex'rs v. Jemison & Stewart	408	Curtis and Pitts,	350
Brown v. Lang et al,	50	Cullum et al v. Erwin, Adm'r,	452
Bradford and Norris,	203	Cullum and Doe ex dem Miller,	576
Bradford and Harris et al,	214	Cunningham v: The Alabama Life	
Brown v. Foster,	282	Insurance and Trust Co.	652

Cullum v. Br. Bank at Mobile,	21	Hazard v. The Pl. and M. Bank,	299
Davis and Reid,	83	Harvey and Morris,	300
Davis v. Wade,	208	Harbin and Woodward,	534
Davis and Trawick,	328	Harrel et al v. Martin Pleasants & Co.	650
Davis & Humphries and Wier,	442	Hall v. Dargan,	696
Dawson & Friou and Leavitt,	335	Herndon v. Forney et al,	243
Dargan and Hall	696	Herbert, Daniel & Co. v. Hrabow-	
Dailey's Adm'r and Givhan,	336	ski's Ex'rx.	265
Da Costa and Boraim & Co.	393	Herbert and Tarlton et al,	359
Douthitt v. Hudson & Brockman,	110	Hester, Wilson, White & Co. v.	
Doe ex dem Brown & Wife v. Hunt		Lumpkin,	509
& Clements,	129	Hill v. Rushing & Wood,	212
Douglass and Cowling,	206	Hinson and The State,	671
Dodge & McKay v. McKay & Mc-		Holbrook, Bowman & Co. and Lacy,	88
Donald,	346	Hogan and Smith et als,	92
Doe ex dem Miller v. Cullum,	576	Holloway and Beauty,	178
Doe ex dem Price and Lucas,	679	Holmes v. Bullock,	228
Dearing, Smith & Co. v. Smith &		Hollinger v. Smith,	367
Wright,	432	Holt v. Moore,	395
Dearman v. Dearman & Coffman,	521	Hopkins v. Land,	427
Durden v. Cleaveland,	225	Howard & Holman v. Kennedy's	
Duffee and Remy, use, &c.	365	Ex'r,	592
Edgar v. Cook, Adm'r,	588	Howell et al and Williamson,	693
Ellis and Thomas & Trott,	108	Hrabowski's Ex'rx. v. Herbert, Dan-	
Elliott & Perkins v. Mayfield & Wife,	417	iel & Co.	265
Elliott, use, &c. v. Montgomery,	600	Hudson & Brockman and Douthitt,	110
Erwin, Adm'r, and Cullum et al,	452	Hunt & Clements and doe ex dem	
Everly v. Bradford,	371	Brown and Wife,	129
Everett and Townsend & Gordon,	607	Huey & Co. and Colton,	57
Farley's Adm'r v. Nelson,	183	Hubbard and Moore et al,	187
Fennell and Castleberry & Collins,	642	Jackson and McKenzie,	230
Figh & Blue and Mead et als.	279	James and Le Baron,	687
Forney et al and Herndon	243	Jemison & Stewart and Booker's	
Foster and Brown	282	Ex'rs.	408
Fournier v. Curry,	321	Jemison & Stewart and Jones &	
Fortune v. The State Bank,	385	Conner,	632
Foster v. Mabe,	402	Johnson and Maynard & Co.	116
Foster v. Goree,	440	Johnson, Adm'r, v. Neil and Wife,	166
Fowler and Collins,	647	Johnson et al and Hayes, Ex'rx,	267
Ford v. Ford,	144	Joy and White,	571
Florence Bridge Co. and White's heirs,	464	Jones & Conner v. Jemison & Stew-	
Frost and Dickinson and Gibbs &		art,	632
Labuzan,	720	Juzan et al v. McRae,	286
Gayle and Watkins et al,	152	Kennedy's Ex'r and Howard &	
Gary et al v. Wood,	296	Holman,	592
Gazzam v. Poyntz,	374	King v. McLoskey,	91
Gee and Miller,	359	Knox and Withers,	138
Gibson v. Andrews,	66	Langford v. Cummings & Cooper	46
Gilliland, use, &c. v. Ware et al,	414	Lang et al and Brown,	50
Givhan v. Dailey's Adm'r,	336	Lacy v. Holbrook, Bowman & Co.	88
Gibbs & Labuzan v. Frost & Dick-		Lawson v. Orear,	56
inson,	720	Lassiter and Crosby,	201
Gliddon and Wiswall,	357	Land and Hopkins,	427
Glover and Quarles,	674	Lassabe and Mialbi,	712
Gosset and Stinson,	170	Lesne v. Pomphrey,	76
Godbold and Scull,	326	Lewis and McWhorter	198
Goree and Foster,	440	Leavitt v. Dawson & Friou,	335
Goldbold v. The Pl. and Mer. Bank,	516	Lewis and Pope,	487
Gordon & Stoddard and McMillan,	716	Lewis and Banks,	599
Gray v. Thacker, use, &c.	136	Le Baron v. James,	687
Gregg v. Crawford,	180	Leavens and The Planters and Mer-	
Harris et al v. Bradford,	214	chants Bank,	753
Hayes, Ex'rx, v. Johnson et al,	267	Light's Ex'rs and Salle,	700

Logan and Bolling & James,	169	Oden v. Rippetoe,	68
Lore and The State,	172	Oliver v. Loftin,	240
Loftin and Oliver,	240	Orear and Lawson,	156
Lock and Smith,	288	Payne v. The Mayor and Aldermen	
Lockhart v. McElroy,	572	of Mobile,	333
Long & Long v. Brown,	622	Penn and Carter,	140
Lovely v. Caldwell,	684	Pegues, Adm'r, v. McRae, Adm'r,	158
Lumpkin and Hester, Wilson, White		Peck & Co. and Randolph,	389
& Co.	509	Pearce and Salter,	669
Lucas v. Doe ex dem Price,	679	Perkins v. Windham,	634
Lyle and Wright,	112	Pitta v. Curtis,	350
Marshall and Br. B'k at Huntsville,	60	Poyntz and Gazzam,	374
Maynard & Co. v. Johnson,	116	Pope v. Lewis,	487
Mansony and Stephenson et al,	317	Powers & Bull v. The State,	531
Mabe and Foster,	402	Pomphrey and Lesne,	76
Mayfield and Wife and Elliott and		Puckett v. Bates,	390
Perkins,	417	Quinn v. Adair,	315
Magee v. Carpenter,	469	Rapelye & Purdy and McMichael	
Maudin et al and Chambers et al,	477	& Shackleford,	323
Mardis' Adm'r v. Shackleford,	493	Randolph v. Peck & Co.	389
Manasse & Mosely and Allen,	554	Remy, use, &c. v. Duffee,	365
Martin & Huntington and The State		Reese and Taylor and Wife,	121
Bank,	615	Reid v. Davis,	83
Martin, Pleasants & Co. and Harrell,	650	Rippetoe and Oden,	68
Magee and Bush,	710	Robbins, Paynter & Co. and Chilton	
Mann v. Bissent et al,	731	& Price,	223
Mansony & Hurtell v. The Bank		Royall and Sample et als,	344
of the United States,	735	Rushing & Wood and Hill,	212
McRae, Adm'r, v. Pegues, Adm'r,	158	Ryland v. Bates,	342
McLoskey and King,	91	Salter v. Pearce,	669
McWhorter v. Lewis,	198	Salle v. Lights Ex'rs,	700
McKenzie v. Jackson,	230	Sandford & Cleveland v. Spence,	237
McCain v. Wood,	258	Sample et als v. Royall,	344
McRae v. Juzan et al,	286	Scull v. Godbolt,	326
McKay & McDonald v. Dodge &		Shields et als v. Alston,	248
McKay,	346	Shackleford and Mardis, Adm'r,	493
McMichael & Shackleford v. Rapelye		Smith et als v. Hogan,	92
and Purdy,	383	Smith et als v. Zaner et als	99
McMillan et al and Miller et al,	527	Smith v. Locke,	288
McElroy and Lockhart,	572	Smith and Hollinger	367
McCall and The State,	643	Smith & Wright and Dearing, Sink	
McNair and Wife v. Cooper,	660	& Co.	432
McRae and Bartlett & Waring,	688	Smith v. The Alabama Life Insur-	
McMillan et al v. Gordon & Stoddard	716	ance and Trust Company,	558
Mead et al v. Figh & Blue,	279	Simpson and Batre,	305
Meador and Caldwell,	755	Spence and Sandford & Cleveland,	237
Miller v. Gee,	359	Spear and Pattison & Broughton,	257
Miller et al v. McMillan et al,	527	Spence and Campbell,	543
Mialhi v. Lassabe,	712	Stinson v. Goeset,	170
Miller and Childress et al,	447	State v. Lore,	172
Moore et als v. Hubbard,	187	State v. Abram,	273
Morris v. Harvey,	300	State and Powers and Bull,	531
Mobile, Mayor and Aldermen of and		State v. Covington et al,	603
Payne	333	State v. Hinson,	671
Moore and Holt,	395	State v. McCall,	643
Montgomery and Elliott, use, &c.	600	Stephenson et al v. Mansony,	317
Munroe and Wiswell et al,	9	Stringfellow and Clark,	353
Mynatt and Boyd,	79	Stubblefield and Oden,	40
Nance and Tipton,	194	Taylor and Wife v. Reese,	121
Ned and Wife v. Johnson, Adm'r,	166	Tarleton et al v. Herbert,	359
Nelson and Farley's Adm'r,	183	Tarver and Brazier,	569
Norris v. Bradford,	203	Thomas and Trott v. Ellis,	108
Oden v. Stubblefield,	40	Thacker, use, &c. and Gray,	136

Tipton v. Nance,	194	Wiswall v. Gliddon,	357
Topp and Croft,	238	Wier v. Davis and Humphries,	442
Townsend and Gordon v. Everett,	607	Willard Freeman & Co. v. Womack,	539
Trawick v. Davis,	328	Windham and Perkins,	634
Traylor and Blount & Stanley,	667	Williams and Cope,	362
Watkins et al v. Gayle,	152	Wood and McCain,	258
Wade and Davis,	208	Woodruff v. The State Bank,	292
Ware et al and Gilliland, use, &c.	414	Wood and Gary et al,	296
White's Heirs v. Florence Bridge Co.	464	Womack and Willard Freeman & Co.	539
White v. Joy,	571	Woodward v. Harbin,	534
Whitehead and the Commercial Bank of Columbus,	637	Wright v. Lyle,	112
Williamson v. Howell et al,	693	Upson v. Austin,	121
Wiswell et al v. Munroe,	9	Yongue et al and Brock et al,	584
Withers v. Knox,	138	Zaner et al and Smith et al,	99

REPORTS

OF

CASES ARGUED AND DETERMINED,

JUNE TERM, 1842.

WISWELL ET AL V. MUNROE.

1. A bond given to obtain an injunction in obedience to the fiat of the Chancellor will not operate as a *supersedeas*, or have the force and effect of a judgment upon a dissolution of the injunction, if it describe a different judgment from that sought to be enjoined by the bill.
2. When a cause is carried to the Supreme Court by writ of error and execution superseded by bond, the judgment of the Court below is merged in the judgment of affirmance of the Supreme Court.
3. A bond executed to obtain an injunction of a judgment affirmed in the Supreme Court, which described only the judgment of the Court below, will not operate as a *supersedeas*, or have the effect of a judgment on a dissolution of the injunction.
4. A bond so executed as to enjoin a judgment at law, has the force and effect of a judgment upon a dissolution of the injunction, without any order by the Chancellor to that effect.
5. The statute which requires the Register to certify to the law court the fact that an injunction has been dissolved, is *mandatory* only, and the failure or refusal of the Register to certify the fact, will not prevent the plaintiff at law from suing out execution on the injunction bond.

APPEAL from the Chancery Court at Mobile.

This was a petition filed in the Chancery Court by the appellee, against the appellants.

The record discloses the following facts :

At the February Term, 1838, of the County Court of Mobile, Denys Casey & Co. recovered a judgment against Charles Cul-lum for \$4,702 44.

Cullum prosecuted a writ of error to the Supreme Court upon this judgment, giving Wiswell as his surety, which was affirmed with damages at the January Term, 1839, and an execution issued against Cullum and Wiswell on that judgment.

Cullum then filed his bill in Chancery, setting forth the rendition of the judgment in the County Court, its affirmance in the Supreme Court, the execution thereon, and, for causes set forth in the bill, prayed an injunction against the plaintiff in the judgment. The *fiat* of the Chancellor is, that an injunction shall issue according to the prayer of the bill, upon bond being executed, &c.

The bond was executed by Cullum and Munroe, as his surety, and recites the judgment of the County Court alone, making no reference to the affirmance in the Supreme Court. The condition is, "Now, therefore, if the said Cullum shall pay and satisfy all damages that the said Casey & Co. shall sustain by the wrongful suing out of said injunction, and abide such decree as shall be made in the premises, then this obligation to be void," &c.

At the fall term of 1839 of the Chancery Court, this bill was dismissed by Chancellor Peck for want of equity. From this decree Cullum prosecuted a writ of error to the Supreme Court, and at the July Term, 1840, of that Court, the cause was reversed and remanded; and at the May Term, 1841, of the Chancery Court a decree was again rendered dismissing the bill, and declaring that the "injunction bond have the force and effect of a judgment;" which was ordered to be certified to the court of law.

Thereupon Munroe, the surety in the injunction bond filed his petition, setting forth the above facts, and insisting that the injunction bond was not taken pursuant to the fiat of the Chancellor, and therefore did not operate as a supersedeas or injunction of the proceedings at law, because the judgment described in it was a judgment of the County Court, and not of the Supreme Court, as shown by the bill; that Wiswell was solvent, and that there was a judgment against him in the Supreme Court, upon which he was fixed.

The prayer of the petition is, that all further proceedings on the injunction bond be suspended, and the certificate heretofore made be recalled.

Upon this petition the Chancellor made an order, granting the prayer of the petition, on condition that bond be executed, &c.

At the April Term, 1842, of the Chancery Court at Mobile the following decree was made :

“ In this case, on an examination of the records referred to in the petition, I find the allegations of the petition to be true in fact, and am of opinion that the petitioner, Hugh Munroe, is entitled to the relief he seeks. It is therefore ordered by the Court, that the order and decree pronounced at the last Term, in the case of Cullum v. Casey and others, as stated in the petition, be modified and annulled, so far as said order and decree gives the force and effect of a judgment to the injunction bond, and that the certificate, certifying the said order and decree, be revoked to the same extent, and this order be certified,” &c.

At the same Term, Wiswell filed an affidavit, praying a rehearing of the petition of Munroe, alledging that by the mistake of his counsel he was not heard.

Wiswell afterwards filed his answer to the petition, insisting that the injunction operated on the judgment of the County Court, and that such was the effect of the order of the Chancellor. He further insists that the decree giving to the bond the force and effect of a judgment was a final decree, and could only be examined, if at all, upon a bill of review. He refers to, and makes a part of his answer, the proceedings in the Chancery suit.

Upon the hearing, the Chancellor affirmed the decree previously made on the petition, setting aside so much of the decree of a former Term as declared that the injunction bond should have the force and effect of a judgment.

From this decree the defendants prayed and obtained an appeal, on condition of executing bond, &c.

The bond was executed by Wiswell, with Moses Waring as his surety.

The errors assigned are—

1. The petition should have been dismissed.
2. The relief sought for by the petition should not have been granted.
3. The injunction bond was valid and should have been enforced.

Wiswell et al v. Munroe.

MR. DARGAN, for appellant.

The only remedy to obtain the relief sought was a bill of review. [2d Smith's Ch. P. 50; 1 Hoff. C. P.; 7th Paige 382.] But the relief here sought could not be granted by bill of review, as this is not what is meant by an error apparent on the face of the decree; and the bond executed by the appellee, as the surety of Cullum, was a substantial, if not a literal, compliance with the *fiat* of the Chancellor, as the judgment of the Supreme Court merely affirmed the judgment of the County Court.

The parties to the bond are estopped from denying that there was such a judgment as they have described in it; especially as the bond produced the effect it was designed to have. [9th Cranch, 36.]

The petition was a motion to alter a decree; it was not a bill—and, therefore, all persons who were parties to, or had an interest in the decree, and the cause in relation to which the motion was made, can appeal from the order or decree granted thereon.

CAMPBELL, contra.

The appeal is prosecuted by Wiswell and Cullum, as appears by the appeal bond, citation, &c. These persons were not parties to the proceedings in the Court of Chancery, and are not properly before this Court. Casey & Co. alone have an interest in this bond, and Wiswell had no right to intervene, and should not have been heard by the Chancellor. The appeal should therefore be dismissed. Munroe was not precluded by the decree of the Chancellor from an inquiry into the effect of his bond. The bond, though connected with the cause, is not a part of the decree, but a mere security for its performance, and, therefore, collateral to it. Being collateral to the decree, and forming no part of it, a bill of review would not lie on account of the declaration of its legal effect by the Chancellor.

The validity of the bond on the part of the surety cannot be examined in this Court, until it has been directly brought before the Court below for adjudication.

The cases in which a bill must be filed, or the parties can

have relief by petition, are not always distinguishable; much depends on the circumstances of the case, and much is left to the discretion of the Chancellor. [10th John. Rep. 530; 2d Paige, 26.]

The cases in which a decree may be corrected, on petition, are numerous. [12th Vesey, Jr. 458; 7th Paige, 382; Cooper, 134; 4th Mad. 464.]

This is not a decree settling the equities of the parties, but relates to the execution of the decree, and is within the control of the Court at any time. The persons who can file a bill of review are parties to the suit, or privies in title or estate.

In Admiralty proceedings a stipulator cannot prosecute an appeal or writ of error. [1 Gal. 227; 1 Mason, 431.]

Where one is interested in a single question, not affecting the merits of the decree, petition is the appropriate remedy.

As to the effect of the bond executed by Wiswell, it is clear that the judgment of the Court below is merged in the judgment of this Court, and that all subsequent proceedings are founded upon it. The Clerk of the Court below is the ministerial officer of this court, and acts upon the evidence furnished by it, and not upon the judgment of his own court. [5th Mass. 376; 4 ib. 462; 13 ib. 266; 9th Cowan, 227.]

Is Wiswell discharged by the injunction bond? After judgment against a surety, or bail, the character of surety is at an end. [5th John. C. 315.] Wiswell was bound by the judgment, and could not have been received as a surety to the injunction bond; it follows, therefore, that the injunction bond is invalid, because it does not apply to this judgment. [Hardin's Rep. 315.] The case in 4th S. and P. 269, does not militate against this view, as it was decided before the passage of the act of 1830, authorizing the rendition of judgment against the sureties in an appellate court. [See, also, 5 H. and J. 234.]

If this bond is confined to the judgment of the County Court, nothing was enjoined, and the Court has only to look at the injunction to see that the judgment in the Supreme Court has not been affected.

ORMOND, J.—The facts of this case are, briefly, that Denys Casey & Co. recovered a judgment in the County Court of Mobile, against Charles Cullum; from which the lat-

ter prosecuted a writ of error to the Supreme Court, with the appellant Wiswell as his surety, where the judgment was affirmed. Cullum then filed his bill in Chancery, praying an injunction of the judgment at law, which was granted, and he thereupon gave bond, with the appellee Munroe as his surety. The bill was dismissed—the injunction dissolved, and the injunction bond directed to have the force and effect of a judgment, and that the Register certify the same, together with a transcript of the bond, to the court of law.

At the succeeding Term, Munroe filed his petition, setting forth that in the bond executed by him as the surety of Cullum to obtain the injunction, the judgment to be enjoined was described as a judgment of the County Court instead of a judgment of the Supreme Court, in which it had been affirmed,—that therefore the bond did not operate as an injunction or supersedeas to the judgment,—and prays a revocation of that portion of the decree which orders the bond to have the force and effect of a judgment.

The Chancellor, on the hearing, set aside so much of the decree of the last Term as gave to the bond the force and effect of a judgment; from which Wiswell prayed an appeal, which was granted.

Without, at this time, entering into an examination of the sufficiency of this bond, we will proceed to the consideration of the question, whether a decree is necessary to give to an injunction bond the force and effect of a judgment after a dissolution of the injunction.

By the act of 1826, [Aik. Dig. 291,] it was enacted, “that every bond executed for the purpose of obtaining an injunction, shall, on the dissolution of the said injunction, have the force and effect of a judgment; and it shall be lawful for the party or parties whose judgment may have been enjoined, to take out execution against all the obligors in the bond, for the amount of the judgment which shall have been enjoined, together with lawful interest thereon, and also the costs incurred in and about the said Chancery proceedings.” It seems perfectly clear that this is a legislative declaration of the effect of the bond when executed, and did not contemplate any action of the Court to give it the “force and effect of a judgment.” That consequence attached to it the moment the injunction

was dissolved. From that time the bond became, in effect, a judgment, upon which the party whose judgment had been enjoined, could immediately, and without application to the Court, as in the case of any other judgment, sue out execution; and an order of the Chancellor, upon the dissolution of an injunction, that such bond should not have the force and effect of a judgment, would be as nugatory as his decree that it should have such an effect, would be unnecessary.

These propositions are indeed so self-evident, that no argument can make them plainer, were it not for the supposed change in the law, by the 6th section of the act to regulate the practice in the Courts of Chancery, passed January, 1841. [Meek's Sup. 65.] Which provides, "that whenever an injunction is ordered to be dissolved, either with or without the six per cent. damage, and *the injunction bond is ordered to have the force and effect of a judgment*, it shall be the duty of the Register to certify the same, together with the transcript of the bond, to the court of law, to the end that the plaintiff at law may have execution on the injunction bond, as well as for the six per cent. damage, if any be awarded."

Was it intended by the Legislature, by this enactment, to confer on the Chancellor the power of declaring whether a bond executed for the purpose of obtaining an injunction to a judgment at law, should have the force and effect of a judgment or not, upon the dissolution of the injunction? We think such was not the intention of the Legislature.

If such an effect be given to it, it will be a repeal by implication, of the act of 1826, previously cited, which declares the legal effect of these bonds.

The well established rules of construction are, that the repeal of a law by implication, is never favored; and that if there be two affirmative statutes upon the same subject, the one does not repeal the other if both may consist together; and it is the duty of Courts to seek for such a construction as will reconcile both. [Warder v. Arelle, 2 Wash. 282.]

"A thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers." [6th Bac. Ab. 385.]

The intention of the Legislature in the passage of this act, is sufficiently plain. Previous to the establishment of the

separate Chancery Courts, the functions of Common Law Judge and Chancellor being united in the same person, and the same person, as Clerk, having the custody of the records in Common Law and Chancery cases—upon the dissolution of an injunction, that fact being known to the Clerk, he immediately issued execution on the injunction bond. But after the separation of these Courts, some difficulty seems to have been felt—though certainly without any just cause as appears to us—in making known to the Clerk of the Law Court, the fact of the dissolution of the injunction. To obviate this difficulty, real or supposed, was the evident design of this section, which makes it the duty of the Register to certify the fact that the injunction has been dissolved, to the Clerk of the Court where the judgment was rendered, together with a transcript of the bond, that execution may issue thereon.

It is most unreasonable to suppose that the Legislature, intending to provide against a particular evil, and providing the appropriate remedy, should, at the same time, intend by indirection, to repeal the law which they were endeavoring to make more efficient. If it had been the design by that act to make such an important change in the law, as that injunction bonds should have the force and effect of a judgment, only in the event the Chancellor should so order and decree, it is impossible to suppose it would have been left to construction, and be carefully wrapt up in doubtful and ambiguous phrases.

We conclude therefore that such was not the intention of the Legislature, and therefore if within the letter of the law, is not within the statute.

It is certainly true, that where a law is plain and unambiguous it is binding on the Courts, and they cannot speculate on consequences. Such in our opinion is not the case here. Even the literal interpretation of the statute is satisfied by supposing the terms “ordered to have the force and effect of a judgment,” to mean, ordered or directed by the *existing law*, to have the force and effect of a judgment. This construction is not, in our opinion, so strained and unnatural as to suppose the Legislature intended by this ambiguous phrase to change the law as it had existed almost from the foundation of the State Government, and for the certainty and unerring pre-

cision of the existing law, to substitute the opinion of the Chancellor.

It is laid down by C. J. Marshall, in the *United States v. Fisher*, [2d Cranch, 342,] that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the Legislature be plain. Of the inconvenience to which the construction contended for would lead, this case affords a conclusive example.

In the case of *Boren et al v. Chisholm*, [3 Ala. Rep. 513,] we considered the effect of a decree of the Chancellor dissolving an injunction, and held that the right of the plaintiff to take out execution on the judgment at law, after a dissolution of the injunction, was not derived from the decree of the Chancellor, but was a right springing into existence upon the dissolution of the injunction. The Court say, "Besides, the issuance of an execution upon a judgment at law, suspended by an injunction of the Court of Chancery, cannot be said to be a proceeding under the decree dissolving the injunction. The injunction was a prohibition to issue the execution until the Chancellor could inquire into the complaint—its dissolution cannot, with propriety, be said to give power to issue the execution, but merely removes a temporary restraint to the exercise of a power which exists independent of the Chancellor."

This reasoning applies with full force to the injunction bond, to which the statute gives the force and effect of a judgment, and authorizes the plaintiffs in the enjoined judgment to issue execution thereon.

This right, thus given by the statute, cannot be defeated by the omission of the Register to certify to the law court the fact of the dissolution of the injunction. The sixth section of the act of 1841, is mandatory to the Register, and does not require the action of the Chancellor; and it would be strange if the omission of the Register to perform a mere ministerial act could affect a right secured by law. If the plaintiff should sue out execution improperly, either on a bond, which, for want of conformity to the bill, or to the *fiat* of the Chancellor, did not operate as an injunction and supersedeas—or prematurely before the injunction was dissolved—in either case the execution would, on application to the Judge of the Court out of which it issued, be superseded and quashed. And in the last men-

tioned case, the parties would also be liable to be punished by the Chancellor for a contempt.

It is no objection to this view of the case, that the injunction bond is on file in the office of the Chancery Court. The plaintiff in the enjoined judgment is the beneficiary of the bond, and would be entitled to a copy of it, from the Register, on demand.

This disposes of the entire case. When the Chancellor dissolved the injunction, the bond became, by operation of law, a statute judgment, if by its terms it operated to enjoin the issuance of an execution on the judgment at law, and whether it could so operate or not, was a question to be determined by the common law Judge. It results from this, that the petition of Munroe should not have been entertained by the Chancellor.

The question whether the bond executed by Munroe operated as a supersedeas to the judgment at law, has been discussed in the written arguments submitted by counsel, and it is proper that it should be decided, to put an end, if possible, to this very litigated case.

The bill filed by Cullum to obtain the injunction, describes the judgment obtained by Casey & Co. against him, in the County Court of Mobile, and states that it was carried by writ of error to the Supreme Court, where it was affirmed. The prayer of the bill is, that the "said judgment be perpetually enjoined, or that a new trial at law be granted to your orator," &c., and that an injunction may issue to said defendants, restraining them from proceeding any further to enforce their judgment at law," &c.

The Chancellor, by his *fiat*, directed "an injunction to issue according to the prayer of the complainant, enjoining the defendants from proceeding to collect their said judgment till the further order of the Court of Chancery," &c.

A bond for an injunction was executed by Cullum, with Munroe as his surety, in the penalty of \$9,404 86, which is double the amount of the judgment obtained in the County Court.

The judgment which the condition of the bond recites as embraced by the *fiat* of the Chancellor is a "certain judgment against the said Cullum, in favor of D. Casey & Co. in the

County Court of said county, for the sum of \$4,702 43, which judgment bears date the 14th February, 1838."

The act of 1826, [Aik. Dig. 258, §26,] provides that "in all cases in which the judgment, sentence, or decree of an inferior Court, shall be affirmed in the Supreme Court, it shall be the duty of said Supreme Court to render judgment against the security or securities on the bond executed on obtaining the appeal or writ of error in the same manner and for the same sum for which judgment shall be rendered against the plaintiff or plaintiffs, complainant or complainants, in the said Supreme Court; and it shall be the duty of the clerk of said Supreme Court to certify the judgment thereof to the Court from which the cause came, against both the principal and the surety or sureties; and it shall be the duty of the Clerk of the Court whose judgment or decree shall have been affirmed, immediately on the reception of the certificate, to issue execution returnable to the next Term of the said Court, against the person or persons against whom judgment shall have been rendered in the Supreme Court, and for the amount of said judgment, in pursuance of the certificate of the Clerk of the Supreme Court."

In our opinion, the necessary result of this enactment is, that the judgment of the inferior Court is, upon its affirmance here, merged in the judgment of this Court, where a new judgment is entered with different parties from the judgment as it existed in the Court below. After the affirmance here, and rendition of judgment against not only the original defendant, but jointly against him and his sureties, if the statute was silent against whom execution should issue, it would necessarily follow that execution must issue against all the parties to the judgment. But the statute contains an express direction to that effect, thereby removing all doubt that it was the intention of the Legislature that the judgment of the Court below, *superseded* by a writ of error bond, should, on its affirmance by this Court, *merge* in the judgment here rendered against the original defendant and his sureties. After the rendition of such judgment an execution issued on the judgment of the inferior Court could be quashed for irregularity.

From this examination, it appears that the bond executed by Cullum and Munroe in this case, did not operate as a *supersedeas* to the judgment obtained by D. Casey & Co. against

Cullum and Wiswell, in this Court, but, by its terms, was designed to supersede the judgment of the County Court, which judgment was then merged in the judgment of this Court, and upon which no execution could issue.

The *flat* of the Chancellor must refer to the judgment of this Court, which was recited in the bill, and to enjoin which the prayer of the bill must refer, as, otherwise, it would be inoperative.

It results from this, that the bond executed by Cullum and Munroe not operating as a supersedeas, whatever may be its effect as a bond, at common law, cannot have the force and effect of a judgment upon a dissolution of the injunction, as that effect is only given to such bonds as *enjoin the judgment*, which was not the fact in this case.

Wiswell was improperly made a party to the petition filed by Munroe, but he was not prejudiced thereby, inasmuch as the Chancellor decreed costs against the petitioner. No notice has been taken of the question argued by counsel, whether the proceeding by petition to reform the previous decree of the Court was regular, or whether it should have been by bill of review, because, as has been shown, the first decree of the Chancellor in relation to the injunction bond was inoperative, and the final order of the Chancellor being correct, though unnecessary, must be affirmed at the cost of the appellant, who has brought the cause into this Court.

CULLUM v. THE BRANCH OF THE BANK OF THE
STATE OF ALABAMA AT MOBILE.

1. The right of a purchaser of land to have a good title, is a right not growing out of the agreement of the parties, but which is given by law.
2. This right exists until the contract of the parties is determined by its execution on the part of the vendor, and when the conveyance has been executed by all the necessary parties, then the rule of *caveat emptor* applies with its utmost rigor. If the purchaser is afterwards evicted by a title to which his covenants do not extend, he is without relief, either at law or in equity.
3. When a purchaser is evicted by a title covered by his covenants of warranty, this eviction cannot be called a failure of consideration, nor is it available as a defence *at law*, to an action for the price of the land. And the reason is, that a court of law cannot do complete justice between the parties, by placing them in *statu quo*.
4. Where the contract of sale has been executed by the purchaser's acceptance of a conveyance, fraud cannot be urged as a defence to an action *at law*, for the price agreed to be paid.
5. When a purchaser with warranty is evicted by a title to which his covenants extend, and the vendor is insolvent, equity will restrain him from recovering the purchase money to the extent for which he is liable to the purchaser on his covenants of warranty.
6. Fraud committed by the vendor in the sale of land by the concealment of an incumbrance, created by himself, by means of which the purchaser is afterwards evicted, is relievable in equity by restraining the collection of the purchase money to the extent of the injury, or by an entire rescission of the contract, although the incumbrance is of record and the conveyance is with warranty, covering incumbrances generally.
7. In all cases of purchase there is a trust and confidence reposed by the purchaser in the vendor, that the estate is not impaired in value or incumbered by any act done by him; and by offering to sell, he virtually represents it as not incumbered by himself, or, if it is, that he will free it before the sale is executed.
8. There are cases in which the mere concealment of an incumbrance, has been held no ground to rescind the contract, when the incumbrance is removed before the hearing, but these cases rest upon the principle that no injury has resulted to the purchaser.
9. It seems that when the occupation has been of any value to the purchaser, the vendor, upon the rescission of the contract, will be entitled to interest on the purchase money, as a remuneration for the occupation, from the time of the purchase until the offer to rescind, and until the abandonment.
10. The purchaser has the right, when an incumbrance has been concealed from him, to require a prompt removal of it; and if this is not effected he is entitled to seek a rescission of the contract, and may abandon the possession, unless he chooses to retain it as a trust fund to reimburse himself for money paid. And

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

- the effect of retaining the possession until a decree for rescission, will be only to charge the purchaser with interest on the purchase money, if the possession is of any value.
11. The fact that a covenant covering the eviction was entered into by the vendor, will not prevent the purchaser from insisting on the fraud, in order to rescind the contract.
 12. The circumstance that the incumbrance could have been removed by the payment of a sum greatly less than that remaining due for the purchase money, is no answer to the claim for rescission, on the ground of fraud, as it is the vendor's duty even in the case of warranty to protect the possession of the purchaser at all hazards, or to suffer the consequences.
 13. When the holder of negotiable paper to which there exists an equitable defence, has given no consideration for its transfer, but it is held merely as a collateral security, to secure a debt due from the payee of the paper, it is open to the same defence as if it was held and owned by the payee. *Quere*, as to how the case would be if the note was not held merely as collateral security, and a new consideration was given either by the discharge of other paper or of other parties.
 14. When the record shows good and bad pleas, upon all of which issues are joined to the country, and evidence is offered which supports the bad pleas only, it is no error for the Court to refuse to instruct the jury that the defendant is entitled to a verdict. The proper course in such a case is for the defendant to request the court to charge that a verdict ought to be returned for him on the plea proved.

WRIT of Error to the County Court of Mobile County.

Action of assumpsit on a promissory note for eleven thousand eight hundred dollars, dated October 17, 1836, and payable three years after date to S. Andrews, or order, negotiable and payable at the Bank of Mobile, signed by the defendant and endorsed to the plaintiffs by S. Andrews.

The defendant pleaded—

1. Non assumpsit.
2. *Actio non*, &c., because the defendant saith that the note in the plaintiff's declaration mentioned was obtained from the said defendant, by the said S. Andrews, by fraud, covin and misrepresentation, in this, to wit: That the same, on the day of the date thereof, was made, executed and delivered by him, the said defendant, to the said S. Andrews, for and in consideration of the sale made by the said S. Andrews, on that day, of a certain lot of land in the city of Mobile, and as a part of the purchase money agreed to be given for the same, and for no other consideration whatsoever. And the said defendant further saith, that upon the sale of the said lot, the said Andrews

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

did, then and there, falsely and fraudulently represent to him, the said defendant, that the title to the said lot, in him, the said Andrews, was full and complete, and that he had full right to sell and convey the same, and that the same was free and discharged from all lawful incumbrances whatsoever, and in particular from all incumbrances done or suffered by him, the said Andrews. And he, the said defendant, in fact saith, that in confidence of the false and fraudulent representations, and believing and supposing the said lot to be free from all lawful incumbrances, he did agree to purchase the same, and not otherwise, and thereupon executed the said note. And the said defendant in fact saith that at the time of the said sale, the said lot stood lawfully incumbered and bound by the force and effect of a certain deed of mortgage, before that time executed and delivered by the said Andrews, to, and for the benefit of, one Philip McLoskey, whereby the said Andrews had conveyed said lot to said McLoskey, subject to the payment of the sum of seventeen thousand one hundred dollars, due by the said Andrews to the said McLoskey, and then and still unpaid. And the said defendant further saith, that so soon after he received notice, or acquired knowledge of the existence of the said incumbrance, and within a short and reasonable time after said sale, to wit, on the — day of —, in the county aforesaid, and before the assignment of the said note, he, the said defendant, gave notice to him, the said Andrews, that he repudiated the said contract of purchase, and demanded of him the return of said notes,—and offered to do all things necessary, and cancel the same on his part, as he lawfully might, for the fraud aforesaid. And the said defendant further saith, that he, the said defendant, hath never received, taken, or held the possession of the said lot so sold as aforesaid, nor received any of the rents or profits thereof, nor derived any profit, benefit, emolument or advantage therefrom; of all which facts and circumstances, the said plaintiffs, at the time of the assignment of said note to them the said plaintiffs, had full notice. And the said defendant further avers, that by reason of the non-payment of the said mortgaged debt, the said lot and the title thereto, sold by the said Andrews to him, this defendant, hath been wholly lost to him, the defendant, and hath become the lawful property of other persons: wherefore, the said defen-

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

dant saith the said note is void in law, and this he is ready to verify, &c.

3. *Actio non*, because the said defendant saith that the said note, in the plaintiffs' declaration mentioned, was executed and delivered at the time of the date thereof, by him the said defendant, and obtained from him by the said S. Andrews, without any lawful consideration whatsoever had and received by him the said defendant, from the said Andrews, for the making thereof; and of which total want of consideration, the said plaintiff at the time of the assignment thereof, had full and ample notice: wherefore, the said defendant saith the said note is void in law; and this he is ready to verify, &c.

4. *Actio non*, because the said defendant saith, that the said note in the declaration specified, was given to the said Andrews, at the time of the date thereof, in part payment of the purchase money agreed to be paid by the defendant to the said Andrews, for a certain lot of land, in the city of Mobile, then sold by the said Andrews to the said defendant. And the said defendant avers, and in fact saith, that upon the sale of the said lot, he, the said defendant, did require that the said Andrews should warrant the title to the said lot against all lawful incumbrances, and against the lawful claims of all persons whatsoever, and thereupon the said Andrews, by his deed of conveyance, of even date with the said note, sealed with his seal, in consideration of the price agreed to be paid for said lot as purchase money, did covenant that he would warrant and defend the said premises, so sold by him to the said defendant, against all and every person lawfully claiming or to claim the same; and the said defendant avers that after making the warranty aforesaid, the said Andrews broke his said covenant of warranty, and failed to keep and perform the same, in this, that inasmuch as the said Andrews before that time executed a certain mortgage to one Philip McLoskey, whereby he had conveyed the said premises to said McLoskey to secure the payment of seventeen thousand one hundred dollars, and inasmuch as the said sum became due and was wholly unpaid by the said Andrews, the said premises were, by due process of law, made subject to the said incumbrance—and the whole title thereto was by the said defendant lost, by reason of the making of the said incumbrance, and which was title paramount to

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

that conveyed by said Andrews to him, this defendant. Wherefore the said defendant saith that the said warranty hath been broken, of all which the said plaintiff had full notice at the time of the assignment of said note by the said Andrews, to the said plaintiff. Wherefore the said defendant saith that inasmuch as said premises have been, by reason of said incumbrance, wholly lost to the said defendant, he the said defendant saith that the said note is void in law, and this he is ready to verify, &c.

Issues were joined on all these pleas, and the cause submitted to a jury, which returned a verdict in favor of the plaintiff for the amount of the note and interest, on which judgment was rendered.

A bill of exceptions was sealed at the trial which discloses that the plaintiff gave in evidence the note described in the declaration; and on behalf of the defendant it was shown that on the day of the date of the note, S. Andrews, the payee, sold to the defendant a lot of ground in Mobile, for the sum of thirty thousand dollars, and gave him therefor a deed of conveyance with warranty of title against the lawful claims of all persons whatsoever, reciting the consideration of thirty thousand dollars, which deed was produced at the trial; and for the payment defendant gave to Andrews his note for ten thousand six hundred dollars, due one year after date, his note for eleven thousand two hundred dollars, due two years after date. and, also, the note now sued on. These notes being for the purchase money and interest.

It further appeared in evidence, that a short time after this purchase, the defendant discovered that Andrews had, on the 22d February, 1836, executed a mortgage of the said lot to Philip McLoskey, to secure to him the payment of seventeen thousand dollars, due by these notes, made by Andrews and payable to McLoskey, one for five thousand three hundred and fifty dollars, due one year after date, one for five thousand seven hundred dollars, due two years after date, and the other for ~~six~~ thousand and fifty dollars, due three years after date, and all of them of the same date as the mortgage. The mortgage was duly recorded some months before the sale to the defendant, but it did not appear that he knew of it at the time of his purchase.

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

The defendant also offered evidence conducing to prove that Andrews had concealed the existence of the mortgage, and that he did not disclose its existence to the defendant when he purchased the lot, and that when the defendant discovered it he charged the said Andrews with the deception, and offered to cancel the deed and notes. It further appeared in evidence that Andrews failed in the spring of 1837, and absconded insolvent, and has ever since continued absent and insolvent—that before leaving the State he transferred the three notes given to him by the defendant. The note sued on was transferred by Andrews to Fontaine and Freeman as collateral security, to secure them against pre-existing liabilities for Andrews, and was by them transferred to the plaintiff as collateral security for pre-existing debts due by Andrews to the Bank.

It further appeared that the lot sold was a vacant lot, that the defendant never took possession of it, and refused to intermeddle with it in any way, that he never received any benefit from the said property, that McLoskey took the control of it, enclosed it, paid the taxes and made the pavement in front of it.

It further appeared that the first note made by Andrews to McLoskey was paid at maturity, but the other two notes, with the mortgage made by Andrews, were assigned by McLoskey to the Planters and Merchants Bank of Mobile, that those two notes were protested, and never paid, that the said Bank filed a bill in Chancery against Andrews and the defendant, to foreclose the mortgage, and that a decree of foreclosure and sale was rendered, under which the lot was sold, but not for enough to satisfy the amount remaining due by Andrews on his mortgage, and that the lot was purchased by the said Bank, which now holds it under this purchase.

The defendant produced the other two notes given by him to Andrews, which had been taken up by him.

On this evidence the defendant requested the Court to charge the jury that if they believed the facts before stated to be proved to their satisfaction, then that the consideration for the note sued on had entirely failed; and that if the note had been transferred by Andrews to the Bank as collateral security merely, and for pre-existing liabilities, and if the defendant had repudiated the contract so soon as he discovered the incum-

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

branches, and had received no benefit whatever under it, but that the title had passed to the purchaser under the mortgage, then the plaintiffs were not entitled to recover.

This charge the Court refused to give, and instructed the jury that the Court could see no reason why Andrews himself might not recover on the note then before the jury. That the recording of the mortgage was notice to the whole world of its existence, and in law the defendant was bound to know the fact, and having relied on his warranty, he had a right to pursue Andrews on that warranty. With a knowledge then of the existence of the mortgage when the defendant purchased the land, he was bound to rely on his warranty. Or the jury might suppose that the price at which defendant purchased would authorize him to satisfy the mortgage and complete his title.

To all this the defendant excepted—and he now prosecutes his writ of error to reverse the judgment rendered on the verdict of the jury, assigning as error the matters shown in the bill of exceptions.

STEWART, for the plaintiff in error, insisted that the judgment ought to be reversed, whatever may be the law arising on the facts, because the second and fourth pleas were fully proved by the evidence before the jury. If, however, the law of the case was to be examined, independent of these pleas he submitted the following points:

1. The Bank holding the note as collateral security, holds it subject to all defences which could be made against it if it was sued by the payee. [10 Wend. 85; *Coddington v. Bay*, 20 John. 637; 13 Wend. 605.]

2. The sale by Andrews was fraudulent under the circumstances shown in evidence. [Sugden on Vend. 6; *ib.* 491; 1 Story's Com. on Eq. §208, 142; 2 Kent's Com. 378.]

3. The defence can properly be made at law. [14 Pick. 293; *ib.* 217; *Morehead v. Gayle*, 2 S. and Porter 224; *Wiley v. White*, 3 *ib.* 355; *Wade v. Kellough*, *ib.* 431; *Wilson v. Jordan*, *ib.* 92; *Pitts v. Collingham*, 9 Porter, 675; *Frisby v. Hoffnagle*, 11 John. 50; *Sill v. Read*, 15 John. 230; *McAllister v. Read*, 4 Wend. 483.]

4. The questions now raised are not within the influence of

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

any of our decisions, that possession passing to the vendee will prevent a defence at law. [Wilson v. Jordan, 3 S. and P. 92; Christian v. Scott, 1 Stew. 490; S. C. Minor, 351; Gilchrist v. Dandridge, Minor, 165; Stone v. Gover, 1 Ala. Rep. 287; Bliss v. Smith, ib. 273; Dunn v. White, ib. 645; Young v. Harris, 2 Ala. Rep. 108; Camp v. Camp, 2 ib. 632; Callaway v. McElroy, 3 ib. 406.]

CAMPBELL, contra.

GOLDTHWAITE, J.—The facts of this case shown by the bill of exceptions, are supposed to present two prominent grounds of defence; the first arising out of the alledged fraud, and the other because of an entire failure of the consideration for which the note sued on was given.

Our first examination will be of the question respecting the failure of the consideration.

1. Most generally the inducement of a purchaser in treating for the acquisition of land, is to become *its owner*. We do not mean to assert that one person may not legally contract with another, who has merely the possession of the land, although *his title* to it may be known to be imperfect, or even bad, but our intention is to show what are the *prima facie* intendments springing out of contracts for the purchase of land, when there are no stipulations between the parties with reference to the title.

In Ogilvie v. Foljambe, [3 Mere. 53,] Sir William Grant says, “the right to a good title, is a right not growing out of the agreement of the parties, but which is given by law. The purchaser insists on having a good title, not because it is stipulated for by the agreement, but on the general right of a purchaser to require it.”

Courts of equity govern their proceedings by this just rule, and when an incumbrance is discovered previously to the execution of the conveyance, the vendor must discharge it, whether he has or has not agreed to covenant against incumbrances, before he can compel the payment of the purchase money. [Sugd. on Vend. Chap. 9, § VI. 315, and cases there cited.]

A similar rule obtains in the courts of law, where all titles, as between the vendor and purchaser, are declared either good

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

or bad, according as their merits may be, for there is no middle term to designate a defective title; [Romelly v. James, 6 Taunt. 263;] and every title to be marketable must be good in equity as well as at law. [Maberly v. Robbins, 5 Taunt. 625.]

2. Such are the rights of a purchaser when he has made no stipulations with respect to the title; but there is a period when the contract of the parties is determined by its execution on the part of the vendor, and then the rule of *caveat emptor* applies with its utmost rigor. This period is when the conveyance has been executed by all the necessary parties, and accepted by the purchaser; after this, if the purchaser is evicted by a title to which his covenants do not extend, he cannot recover the purchase money, either at law or in equity. [Sugd. on Vend. Chap. 9, §VI. 346, and cases there cited.] His neglect to look into the title is then considered his own folly, for which he has no relief, [ib. 347,] and this rule applies equally whether the money has been paid or is only secured to be paid. [Ib. 349; Thomas v. Powell, 2 Cox, 394.]

The true rule with respect to the liability of the vendor, and the obligation of vigilance imposed on the purchaser, is most appropriately stated by Mr. Fonblanque, who says, "the principles upon which courts of law proceed upon the subject of warranty, so strongly tend to reconcile the claims of convenience with the duties of good faith, that I cannot conceive the mean by which they can receive an additional extent, or be in any degree circumscribed, without endangering the interests which they are now so well calculated to preserve. To excite that diligence which is necessary to guard against imposition, and to secure that good faith which is necessary to justify a certain degree of confidence, is necessary to the intercourse of society. These objects are attained by those rules of law which require the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention to those points where attention would have been sufficient to protect him from surprise or imposition the maxim *caveat emptor* ought to apply; but even against

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

this maxim he may provide, by requiring the vendor expressly to warrant that which the law would not imply to be warranted. If the vendor be wanting of good faith, *fides servanda* is the rule of law, and can scarcely be more effectually enforced in equity than it is at law." [1 Fonb. Treat. on Equity, 362, note h.]

3. We do not understand the counsel for the plaintiff in error as disputing the principles just adverted to, but rather as insisting, that, there being in this case an express warranty covering the eviction, under which Andrews would be liable to the extent of the sum agreed to be paid him by the defendant, that therefore a recovery ought not to be permitted in favor of his assignee; and the more especially that it ought not to be allowed when Andrews is shewn to be insolvent, and thus unable to respond in damages.

Such a defence, whatever may be its merits, cannot be called a failure of the consideration for which the notes were given, because, if there was no warranty whatever, the defendant would be without relief. It follows, that if he is now entitled to a remedy, it must be in consequence of the warranty and the subsequent insolvency of the warrantor, by which the covenant intended for the purchaser's security has become unavailable.

Without now stopping to inquire whether these circumstances afford a reason for equitable interposition and relief, we think it clear that they do not make out a *legal* defence, even in a case where the recovery on the covenant of warranty ought to be equal, or larger, than the sum sued for. The reasons which induce this conclusion are these: In the first place, the damages to be recovered on a covenant of warranty are, in their nature, unliquidated, and therefore are not the subject of a set off, according to our judgment in the case of *Dunn v. White and McCurdy*, [1 Ala. Rep. N. S. 645.] 'Secondly, the covenant of warranty would not be extinguished by this defence. Thirdly, the covenant itself operates as an estoppel to the grantor, and would have the effect to transfer to the purchaser or his assigns, any subsequently acquired title, which should be vested in the grantor. Fourthly, by the conveyance all covenants running with the land are, *ipso facto*, assigned to the purchaser.

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

This last reason, it is apparent, does not apply to this case, because the breach of covenant is a consequence of the vendor's own act, but it must so frequently apply to cases that it is decisive against the adoption of a practice which would be more like an exception than a general rule.

But independent of these reasons, the facts of this case, (excluding for the present all consideration of the matter of fraud,) bring it within the influence of the decision made by us in *Dunn v. White and McCurdy*, [1 Ala. Rep. N. S. 645,] in which we held that a partial failure of consideration was not an available defence to an action for the purchase money of lands of which the purchaser retained the possession. It appears here that the defendant purchased the lot in October, 1836. The conveyance then made transferred the possession to him as absolutely, in point of law, as if he had been invested by *livery of seisin*. [*Bliss v. Smith*, 1 Ala. Rep. N. S. 273.] This effect is produced by the operation of our statute, similar to the English statute of uses on the conveyance. [Aik. Dig. 94, §37.] Under this conveyance the purchaser was entitled to retain the possession until the forfeiture of the condition of the mortgage, executed previously, by Andrews to McLoskey. This forfeiture did not take place until February, 1838, when the second note secured by it was dishonored, consequently, during the interval between these periods, the defendant is entitled to the *usufruct*, and can be made responsible to no one for rents or profits in any form of action. [4 Kent's Com. 157; *Stanard v. Eldridge*, 16 John. 254.] If the defendant was seeking a recovery against Andrews by an action on the covenant of warranty, the measure of damages would be the price agreed to be paid, or actually paid, with interest thereon, from the time at which the defendant would legally be responsible to another for *mesne* profits, together with the cost of the ejectment suit. [*Bennet v. Jenkins*, 13 John. 50; *Caulklin v. Harris*, 9 John. 324; *Pitcher v. Livingston*, 4 John. 1; *Slaats v. Teneyke*, 3 Caines, 111; *Baldwin v. Munn*, 2 Wend. 399; *Wagers v. Schuyler*, 1 Wend. 553.]

We have not considered it important to ascertain the exact period when the lot was abandoned to McLoskey, if indeed it was so abandoned, or whether the defendant was authorized to abandon to one claiming title, without suit, for the reason,

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

(whatever may be the rights of parties with reference to this matter,) that we consider the sale and possession, under the decree of foreclosure, as equivalent to a legal eviction, it being a part of the case that the defendant was a party to that suit. Nor is the circumstance that the defendant has paid the other two notes, if such is the proper inference to be drawn from the fact that he has them in possession, of sufficient importance to introduce a modification of the principles just ascertained.

The true question, so far as a court of law is concerned being whether the defence asserted can be sustained without overstepping the boundary which divides the jurisdiction of law and equity, and not as to the amount to be recovered.

From what has been previously shown, it will be seen that all the consequences flowing from the conveyance and warranty will be the same, whether the defence is successful in whole or only in part. It is because a court of law cannot do complete justice between the parties by placing them in *statu quo*, that this defence, under this aspect, is properly referable to equity jurisdiction.

4. The question of fraud is not entirely novel in this court, although it never has been presented in the same imposing manner.

In *Christian v. Scott*, [Minor 354, S. C. again before the Court, 1 Stewart, 490,] one of the defences insisted on was, that the bond, the foundation of the action, was given in payment for land, to which the vendor represented he had a fair title, and that it was clear of all incumbrances. It was shown that the land was incumbered with a deed of trust, executed by the vendor to secure the payment of a sum of money due from him, and there was no evidence that the purchaser was informed or otherwise knew of it. The purchaser had taken possession of the land, and received a conveyance of it from the vendor. One of the charges requested was, that although the vendor had made fraudulent representations as to his title, yet if the purchaser received the possession, and carried the contract into execution by taking upon himself the ownership of the land, payment of the bond could not be resisted. This Court reversed the judgment of the Circuit Court for refusing to give this charge.

By this recital it will be seen that the case was similar in all

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

respects to this, except that here the additional fact of eviction by reason of the incumbrance is presented.

Some expressions are used by the learned Judge who delivered the opinion in the subsequent case of *Wilson v. Jordan*, [3 S. and P. 92,] from which it may be inferred that a change of opinion as to the defence had obtained in the court at that time; but when that case is examined we find the question of fraud was not involved, either in the pleadings or proofs of the cause. Indeed all inference of fraud is rebutted by the statement that it was not relied on as a defence. Independent of this, it can scarcely be supposed that the case of *Christian v. Scott*, which had been twice before the court, would be overruled without any reference to it. The course of decision ever since has been adverse to any investigation of the title or of any defect in the estate, when the possession is retained by the purchaser, and the contract is not rescinded. [*Wade v. Kilgough*, 3 S. and P. 431.]

Even in contracts for the acquisition of personal property, fraud has never been admitted as a complete bar to a suit for the purchase money, unless the defendant has returned, or whenever practicable, offered to return, the purchased chattel. [*Cozins v. Whitaker*, 3 S. and P. 322; *Barnes v. Bailey and Du Bard*, 2 Ala. Rep. 749, and cases there cited.]

There are many distinctions between the rules which affect real and personal estates, which are distinctive features of the common law, and their ramifications extend so far that no one can clearly foresee the consequences of overturning them. Among these not the least important are the different modes of succession after the death of the last possessor, and the different effect of covenants respecting each species of estate.

If the defence of fraud was permitted in this case, to avoid a recovery at law, there is nothing in the record to show that the contract has ever been rescinded, and therefore Andrews hereafter might be liable to an action on his warranty; or in the case of a title subsequently acquired by him, be estopped by his covenant from asserting it. Many other difficulties may be supposed which do not indeed apply to this particular case, as it is presented on the record, but which are conclusive against the admission of this defence as a general rule. Take for instance, the case of an eviction after the receipt of large

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

rents, or profits, for which the purchaser is not responsible to the evictor; are these to remain unaccounted for, or must not the defence be denied under the influence of our previous judgment in *Dunn v. White and McCurdy*?

Again, a case may be stated which seems to furnish an absolute test of the unsoundness of this defence at law. In the event of the death of the purchaser before eviction, and previous to payment of the purchase money, the estate would descend to the heir, whilst the personal representative would be answerable for the debt. Which is entitled, the personal representative to defeat the action against him on the notes, or the heir to his action on the covenant of warranty?

5. This examination of principles and authorities leads us to the conclusion that the defendant has no available defence at law: but it is asked, whether it can be supposed that he is remediless, in a case where injury is so apparent? We answer that no such consequence flows from the assertion of these rules.

Assuming that the warranty was entered into in the most perfect good faith, we think relief must be given in Chancery, on the ground of Andrews' insolvency, if the present holders of this note are not to be considered as its *bona fide* holders, a matter which we shall hereafter advert to.

When the defendant accepted of the covenant of warranty, it was doubtless considered as an effective security, and if he had been evicted before the payment of the purchase money, our impressions tend strongly to the propriety of not permitting Andrews himself, if insolvent, to receive that portion of the purchase money which he would be compelled to refund in an action on the warranty, though we are aware of decisions to the contrary; but however this may be, his insolvency furnishes a ground of equitable relief entirely within the influence of the case of *Farr and Beck v. Reynolds*, [3 Al. Rep. 521.] It is useless to pursue an insolvent indorsement but it is quite too injurious to be allowed to pay him money which he will never refund.

6. As to the defendant's relief in equity, upon the allegation of fraud, we think also there is no question, provided it is sufficiently made out by proof. Mr. Sugden says, in his *Treatise on Vendors*, [Chap. 7, §III. 309,] that when a vendor gives a

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

false description of the estate, the purchaser may at law rescind the contract; but this must be understood to mean only those cases where the *contract is executory*. To this extent and no further do the cases cited by him support his text. [Duke of Norfolk v. Westly, 1 Camp. 337; Fenton v. Brown, 14 Vesey, 144; Blank v. Christer, 1 Salk. 128; see also Sherwood v. Sammon, 2 Day, 128; S. C. in Equity, 5 Day, 439; Cottingham v. Pitts, 9 Porter, 675.]

That this is Mr. Sugden's own view of the jurisdiction is apparent when he subsequently says, [in Chap. 9, §VI, 564,] "although the purchase money has been paid, and the conveyance is executed by all the parties, yet if the defect (of title) does not appear on the face of the title deeds, and the vendor was aware of the defect, and concealed it from the purchaser, or suppressed the instrument by which the incumbrance was created, or on the face of which it appeared, he is in every such case guilty of a fraud, and the purchaser may either bring an action on the case or file his bill in equity for relief." [See also Brice v. Holback, Doug. 654; Early v. Garrett, 9 B. and C. 522.]

But the bill in Chancery in most cases will be found to be a better remedy; it will lead to a better discovery of the concealment and the circumstances attending it, and may in some cases enable the court to create a trust in favor of the injured purchaser. [3 Coke Litt. H. and Butler, note 384, a.]

It is urged, however, that there is here no evidence of fraud, and that the purchaser either knew or is chargeable with notice of the incumbrance, because it was not only registered, but was in fact disclosed when the title was known to come to Andrews from McLoskey, who would have retained an equitable mortgage so long as the purchase money was unpaid to him. It cannot be denied that the defendant was in error, in not making an examination of the register, and also in not ascertaining from the previous vendor, whether he pretended to any lien; but this does not exculpate the vendor.

7. In all cases of purchase there is a trust and confidence reposed by the purchaser in the vendor, that the estate is not impaired in value, or incumbered by any act done by him. Indeed, by offering to sell an estate, the vendor virtually represents it as not incumbered by himself, or, if incumbered he,

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

will free it before the sale is executed ; and if he wishes to discharge himself from the consequences of this implied representation, it lies with him to show that the purchaser was informed or otherwise knew of the incumbrance.

In the case of *Harding v. Nelthorpe*, [Nelson, 118,] an issue was directed to ascertain whether the vendor knew of an incumbrance charged on the purchased land, but this course of proceeding in that case, shows that the incumbrance must have been created by some other person than the vendor. The case of *Cater v. Pembroke*, [1 Bro. Ch. C. 301, S. C. on appeal ; 2 ib. 281,] also bears on this point, and we infer from it the English Courts of Chancery recognize the rule we have just laid down.

8. There are cases in which the mere concealment of an incumbrance, created by the grantor, may not be sufficient cause to rescind a contract, although such a concealment certainly is a breach of the good faith which ought to be observed in all contracts ; but these cases rest on the principle that no injury has been sustained by means of the incumbrance.

Of this class is *Hunt v. McConnell*, [1 Monroe, 219,] which decided that the omission of the vendor to disclose the fact of an incumbrance created by himself when he is not actuated by a fraudulent intention, and when the purchaser sustains no injury from it, is not a sufficient ground to rescind the contract, provided the incumbrance is removed before the hearing. But it is said the matter would assume a more imposing aspect if the incumbrance had proved injurious to the purchaser. The same doctrine was recognized in the subsequent case of *Campbell v. Whittingham*, [5 J. J. Marshall, 96.] These cases, resting on the principle we have adverted to, have no tendency to restrict the rule declared in the leading case of *Pasley v. Freeman*, [3 Term 51,] where it said that the *concurrence* of fraud and injury is necessary to sustain an action on the case for a deceit.

There is no question here as to the injury, because the lot has been taken from the defendant in consequence of the foreclosure and sale under the mortgage, therefore, if the fact of the existence of that incumbrance was unknown to him, he is entitled, in our opinion, to a rescission of the contract, whether

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

there was or was not any fraudulent intention on the part of the vendee to work this injury to the purchaser.

9. In the case of *Edwards v. McLay*, [Cooper 308, S. C. on Appeal; 2 Swanst. 287,] the purchaser was held entitled to recover the purchase money with interest, from the time when he quitted the *valuable occupation* of the land, together with what he had expended for repairs, &c. This seems to indicate that if the occupation has been of any value to the purchaser, then the vendor, upon the rescission, would be entitled to interest on the purchase money, as a remuneration for the occupation from the time of the purchase until the offer to rescind and until the abandonment. We regret that we have not had access to the report of the case of *Small v. Atwood*, [Young 408,] and the same case on appeal to the House of Lords, in which we understand all the English cases upon the rescission of contracts for the purchase of real estate, are examined, as it would probably shed much light on this somewhat obscure branch of the science, and especially upon the manner in which courts of equity mete out justice to both the purchaser and vendor.

10. Without the aid of precedent to guide us, we can arrive at no other conclusion than that the purchaser has the right, when an incumbrance has been concealed from him, to require a prompt removal of it, and if this is not effected, he is entitled to seek a rescission of the contract; and may abandon the possession, unless he chooses to retain it for the purpose of charging the land with a trust to reimburse himself for money paid; nor is it under any circumstances essentially necessary that he should abandon the occupation, as the only effect of retaining it until a decree of rescission, even in cases where the occupation is of any value, will be to charge him with the interest on the purchase money. That the land may be made chargeable with such a trust is recognized in *Cater v. Pembroke*, [1 Bro. Ch. C. 301; 3 Coke on Litt. H. and Butler's note 381 a.]

11. It has been argued that the purchaser has no relief in any forum for the fraud, inasmuch as he has taken a covenant from the vendor, which covers the precise injury sustained. We have examined the case of *Leonard v. Pitney*, [5 Wend. 30,] where it is put with a query whether an action on the

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

case will lie where the purchaser has accepted a deed without warranty; but independent of many cases in the books to the contrary, we consider the matter at rest in this Court, in consequence of the judgment given in *Cozens v. Whitaker*, [3 S. and P. 330.] That was case for a deceit in the sale of a personal chattel, where there also was a warranty, but we can perceive no satisfactory reasons for any distinction to be made in the sale of lands. The case of *Cater v. Pembroke* before cited, is satisfactory to show that a court of equity may relieve for a fraud in the sale of lands, although there is also a warranty.

12. It has also been strongly urged that this defence is but an attempt to procure relief from a hard bargain; that there is nothing to show that the defendant has paid the other notes given for the land, though he has them in his possession; and the incumbrance could and would have been discharged if the defendant in reality had paid any one of the notes: it is said furthermore, that the defendant himself could have paid off this incumbrance, and might have retained the sum paid out of that due to Andrews. All these matters may be as supposed, and yet the right of the defendant to relief is not impaired.

When the facts of this case are considered in the most favorable aspect for Andrews, he was bound at all hazards to prevent a breach of his covenant of warranty; and if he was sued for that breach, he would not be permitted to assert, or show, that the defendant might have avoided eviction, either by paying off the incumbrance, or by purchasing in an outstanding title. These were privileges which the defendant might exercise if he would, but his omission furnishes no excuse to the vendor.

On the other hand, it will be quite in time for the plaintiff to show that this defence is a mere pretence, and that the defendant acquiesced in the purchase after a knowledge of the fraud, and until circumstances had rendered it desirable to avoid the purchase. Equity requires diligence and promptness in urging a rescission on the ground of fraud, and frequently presumes a waiver, or leaves the party to his remedy at law. [*Hardwick v. Forbes*, 1 Bibb, 212; *Robinson v. Galbraith*, 4 Bibb, 183; *Colyer v. Johnson*, 2 Munroe, 16.]

13. The right of the defendant to urge this defence against

Cullum v. The Branch of the Bank of the State of Alabama at Mobile.

the present holder of the note arises out of the circumstances stated in the bill of exceptions, and these show that no new consideration was given by the bank when it acquired the property in the note, but that it was transferred to them as collateral security, to secure a precedent debt due from Andrews.

A decision on this point is not required, in consequence of the conclusions at which we have already come; but it may be said that all the authorities concur in admitting this defence *under the circumstances shown in evidence*.

How the law would be if it shall appear that the note is not held *merely* as collateral security, but that a new consideration was given by the discharge of other paper, or of other parties, by the acceptance of this note previous to its maturity, and without notice, are matters which we decline now to consider, and we only advert to them to show that these questions are not involved in this case as presented.

14. One other question remains to be considered. It is said the second and fourth pleas are supported by the evidence, and therefore it is insisted that the charge should have been given, whatever may be our opinion upon the abstract merits of these pleas. From what has been said it will be seen the second plea is not in fact sustained, because it asserts that the defendant never had possession of the lot; but the fourth plea is supported by any legal defence according to the principles we have laid down by the proof in every allegation. Neither of these pleas declared.

We do not question the right of the defendant, even under such a state of defective pleading to require the Court to instruct the jury to find a verdict on the proper issue sustained by his proof, because, in that event, the plaintiff would be placed in a condition to extricate himself from the vicious plea by a motion to enter a judgment *non obstante veredicto*. [Stephens on Plead. 129, and cases there cited.] The defendant did not pursue this course, but asked a charge which, if given, would have led to a general verdict, and the plaintiff would, in that case, have been remediless, (as under the issue of *non assumpsit*,) the reason on which the verdict was founded could not have been ascertained.

We wish our decision on this point to be understood as restricted to the precise case which appears, for if a general

charge is asked when all the pleas are *good*, we cannot see clearly how either party can be prejudiced.

We cannot perceive that the defendant has been injured by the refusal to give the charge requested, or by that actually given, therefore the judgment of the County Court is affirmed.

ODEN v. STUBBLEFIELD.

1. In order to charge the husband with knowledge of a fact, it is not permissible to shew that it had been spoken of in his family, and before his wife; especially if he had no such interest in the matter as to warrant the conclusion that the wife, repeated to him what she had heard.
2. The declarations of a person in respect to personal property, of which he is in possession, are admissible as part of the *res gestæ*.
3. A person in possession of personal property as an agent, may acquire a title in favor of creditors and purchasers, where the property is given or lent to him, with a reservation to the giver or lender; unless the reservation is in writing and duly acknowledged, &c. and recorded, or a demand of possession is made and pursued by due course of law within three years. And, although a sum of money was paid by such donee, or loanee, as hire, it would not, as it respects his creditors and purchasers, prevent a divestiture of the donor or lender's reservation.

WRIT of Error to the Circuit Court of Talladega.

This was an action of *detinue* by the defendant in error against the plaintiff, for the recovery of a negro woman named Sally, and her three children. The cause was tried on the *general issue*. On the trial a bill of exceptions was sealed by the presiding Judge, at the instance of the defendant below, from which it appears that the plaintiff gave the negro woman in question, with the oldest child, and her future increase, (which are the two younger children,) to his son, William T. Stubblefield, reserving to himself their possession during his life: all which appears by a deed bearing date the 28th January, 1837, which was never recorded, as required by the second section of the statute of frauds. [See this case reported in 2 Ala. Rep. 684.] The defendant claims under Wm. T. Stub-

Oden v. Stubblefield.

blefield, and adduced at the trial his bill of sale, dated the 18th April, 1839, which acknowledges the payment of one thousand dollars, and in consideration thereof conveys the slaves in controversy to the defendant.

There was evidence showing that Wm. T. Stubblefield was in possession of the woman and her eldest child at the date of the deed of gift from the plaintiff to him, but whether the possession was acquiesced in, or continued for three years without interruption, was a question controverted by the parties.

The questions of law presented for examination arise upon objections to the evidence and the charge to the jury ; to make them intelligible, the facts will sufficiently appear from the opinion of the Court.

RICE, PECK and L. CLARK for the plaintiff in error.
CHILTON, for the defendant.

COLLIER, C. J.—The first objection to the evidence is well taken. It appears that the plaintiff was allowed to prove that the deed from himself to his son, had been spoken of in defendant's family, and before his wife, as a circumstance from which the jury might infer that the defendant had "the same chance of information." The testimony was entirely irrelevant and well calculated to mislead. If the defendant had been informed, previous to his purchase of Wm. T. Stubblefield, of the reservation in the deed of the plaintiff, it could have had no influence upon his title, if the possession of his vendor, coupled with his own, had continued for three years. Such was the decision of this Court when this cause was here twelve months ago. [2 Ala. Rep. 684. See also *Myers v. Peek's administrator*, ib. 648.] But if the evidence had been pertinent, it should not have been received ; for though the conjugal relation supposes that the wife is unreserved in her communications to the husband, yet it by no means follows that she informs him of every thing she may hear ; especially if it be not likely to interest or affect him in some way. Now it does not appear that the defendant had or was about to acquire an interest in the slaves, at the time his wife heard the deed from the plaintiff spoken of, so that it cannot be reasonably intended that she repeated what she had heard. Nor can it be admit-

ted, that because the wife heard a fact related, her husband, whose means of information were equally as good, was also advised of it.

The second objection to the admission of evidence relates to the declarations of Wm. T. Stubblefield, which it is insisted should have been rejected.

It appears from the bill of exceptions, that the negro woman, some time in 1838, ran away from W. T. Stubblefield, and went to the plaintiff's house, where she remained for eight or ten days; the former then went for her, when, as he stated, he had some difficulty in getting her away from the family, and to satisfy them, he had promised to return her at the end of the year. It is not expressly stated, but the fair inference is, that this declaration was made by Wm. T. Stubblefield during the continuance of his possession. Upon this assumption the evidence was clearly admissible. In respect to real estate, it is said the general doctrine, that the declarations of a tenant in possession of land are admissible as a part of the *res gestæ* has seldom been denied. [2 Phil. Ev. C. & H. ed. 600; Bliss v. Winston, 1 Ala. Rep. 344.] And the same rule prevails in its utmost extent as to personal property. [2 Phil. Ev. 601.] Thus on an appeal between two towns, contesting the settlement of a negro, it seems that the declaration of a person, made in respect to his title to the negro while in his possession as a slave, are receivable in evidence. [Overseers of Germantown v. Overseers of Livingston, 2 Caine's Rep. 106; see also Walk-up v. Pratt, 5 Har. and John. 51.] And, in Willies v. Farley, [3 C. and Payne's Rep. 395,] it was held what one in possession of goods said as to whose property they were, is evidence. To these citations many others quite as pertinent, might be added, but the question is too firmly settled to make its further consideration at all necessary.

In refusing to give the charge prayed by the defendant, the Court impliedly affirm, that if William T. Stubblefield first acquired the possession of the slaves as the agent of his father, a continuous possession for three years, demand made and pursued as required by the second section of the statute of frauds, will not perfect the title of a *bona fide* purchaser from him. It is certainly true that one who acquires and holds personal property as the agent of another,

cannot transmit to a third person, having notice of his agency, a title to that property, in violation of the trust. But one having possession as agent, may as a donee, with a reservation to the donor, or as a loanee, acquire a title in favor of creditors and purchasers, if the deed or writing is not recorded, and he remains in possession for three years without demand made and pursued by due course of law, and this although the possession was first acquired as an agent.

The Court instructed, the jury that if the plaintiff received the two dollars agreed to be given by Wm. T. Stubblefield on account of the hire of the negroes, then the possession of Ragland, in 1837, was the possession of plaintiff. The evidence was, that Wm. T. Stubblefield hired the negroes to Ragland in the latter part of the year 1836, at ten dollars *per month*; the plaintiff was dissatisfied because they could have been hired for more, and to quiet his complaints, Wm. T. Stubblefield agreed to pay in addition two dollars for each month. Ragland has never paid the plaintiff any part of the hire, not conceiving it to be due him, though he has occasionally claimed it; nor does it appear that the plaintiff has received any part of the hire from his son. This charge cannot be sustained. As it respects creditors and purchasers, the actual payment of the hire by Wm. T. Stubblefield, could not have interrupted the continuity of his possession, and in their favor if it continued for three years without demand made and pursued by due course of law, it would divest the reservation which the plaintiff had made in his own favor. The cases cited from 2 Ala. Rep. are full and direct to the point.

No question of law arises upon the evidence in relation to the possession of the plaintiff, of the woman during the period of her elopement in 1838; or whether it was a legal interruption of Wm. T. Stubblefield's possession. As this is a question of law, by no means difficult of solution, when the facts are ascertained, we leave it to be determined by the Circuit Court. We have only to add, that the judgment is reversed and the cause remanded.

WILLIAMS AND WIFE v. BRYANT AND WIFE.

1. In slander, the words charged to have been spoken, or at least some of them, must be proved to have been spoken precisely as laid, and it will not be sufficient to prove the speaking of words of equivalent import.
2. The charge in the declaration, that a woman was called "a whore," is not established by proving that she was called "a strumpet."

ERROR to the Circuit Court of Talladega.

This was an action on the case by the defendants in error, for slanderous words spoken by the wife of the plaintiff in error of the wife of the defendant in error.

The words charged in the declaration are, that the wife of defendant was "a whore." The proof was, that plaintiff and defendant were making a settlement, and at its termination the latter asked the former if he was satisfied, who replied that he was, except in regard to a statement which defendant's wife had made of his wife; whereupon defendant's wife, who was present, became agitated, and observed that she had said Mrs. Bryant was a strumpet, and she still believed it.

The counsel for the defendant moved the court to charge the jury that this was not such a publication of slanderous words as would authorize a finding for the plaintiff, which charge the court refused to give, and the jury found a verdict for the plaintiff, from which this writ of error is prosecuted. The assignment of error brings to view the propriety of the charge of the Court.

CHILTON, for the defendant in error, insisted that the admission of the wife of plaintiff in error, that she had used the words imputed to her, could not be given in evidence to prove a publication. [7 Term. 112; 2 Ala. Rep. 339; 1 Philips on Ev. 81.]

The variance between the words spoken and those charged is fatal.

ORMOND, J —The act of February 2d, 1839, making words actionable in themselves, which impute a want of chastity to any female person in this State, will certainly support this action, either upon the words as charged in the declaration, or those proved to have been spoken.

The words charged in the declaration and those proved to have been spoken are of equivalent import, both imputing a want of chastity in the person of whom they are spoken, and if it is sufficient to prove the substance of the words charged will maintain the action.

It is stated in Buller's N. P. 5, that it is sufficient to prove the substance of the words charged, and that the strictness formerly required has been abandoned; but this is denied to be law by the more recent authorities, which hold that the words, or at least some of them, must be proved precisely as laid, and it is not sufficient to prove words of equivalent import. In *Rex v. Berry*, [4th Ter 11 Rep. 217,] it was held that an indictment charging these words, "*He is a broken down Justice*," is not supported by proof of the words "*You are a broken down Justice*." An averment of words spoken affirmatively is not supported by proof of words spoken by way of interrogation. [*Barnes v. Holloway*, 8th Term, 150.] So in *Maitland v. Goldnecy*, [2 East. 434,] it is expressly laid down that it is not sufficient to prove equivalent words of slander. [See also, *Harrison v. Stratton*, 4th Espinasse, 218; *Johnson v. Tait*, 6th Binney, 121; and *Walters v. Mace*, 2 B. and A. 756.]

This has been the doctrine held previously in this Court, in the case of *Commons v. Walters*, [1 Porter, 377,] where the Court say that it is not sufficient to prove words "*tantamount*" to those charged. It is not necessary to prove all the words charged, provided such as are proved are slanderous, and all the words are not necessary to constitute the charge. As where the words charged were, "*He is a maintainer of thieves and a strong thief*," the word *strong* was held to be immaterial. [Dyer, 75.]

We are aware that there are cases in which the contrary doctrine has been held, but we consider the better authority to be, that the words must be proved as laid; or at least so much of the charge as will constitute the slander, and that it is not sufficient to prove words of equivalent slanderous import.

Langford v. Cummings & Cooper.

This view renders it unnecessary to consider the question of the sufficiency of the publication.

Let the judgment be reversed and the cause remanded.

LANGFORD v. CUMMINGS & COOPER.

1. The belief of a witness is not evidence, but if his impressions are stated and not excepted to, nor any charge requested with respect to such testimony, there is no question raised on the record.
2. A contract in writing, to deliver an article at a particular place, may be modified by a subsequent verbal contract, appointing a different mode of delivery.
3. The statement of the evidence shows, that a custom upon a particular river was proved, and the Court refused to charge that usage by *one boat* would not constitute a custom. The refusal is proper, because no foundation for the charge appears from the evidence.
4. Two contracts in evidence before the jury, and a charge is requested on one aspect of the case, and given with the explanation that the question is not involved, and directing the attention of the jury to the other question, is not error.

WRIT of Error to County Court of Tuscaloosa County.

Assumpsit. The declaration contains a special count on the written contract hereafter set out, and the common counts.

At the trial the plaintiff read in evidence an account in these words:

"Tuskaloosa, February 24th, 1838.

Mr. J. LANGFORD, to CUMMINGS & COOPER, Dr.

To making frock coat \$52—which coat is to be delivered to said J. Langford, at Coffeeville.

Received payment in full,

CUMMINGS & COOPER."

The defendants then proved by a witness who had been in their employ, that, at the date named in the account, one of them inquired of the witness whether he could make a frock coat for the plaintiff by the return of the steam-boat Pilot. The witness replied that he could, and the parties then agreed that the coat should be delivered to Capt. La Rock,

(who commanded the steamboat Pilot,) on his return from Mobile, with instructions to deliver it to the boy of the plaintiff, who was ferryman at the Coffeeville ferry. The partner with whom the contract was made, had previously proposed, in the same conversation, to send the coat by the Captain of another steamboat, but the plaintiff would not consent. He also said, at the same time, that Captain La Rock was a careful man, and if the coat was delivered to him the plaintiff would be sure to get it. The witness believed, from what took place at the time, that this oral agreement was subsequent to the written one, though he admitted he never had seen the latter, and did not know of its existence until the trial. The defendants also proved that the coat was delivered to the Clerk of the steamboat Pilot, addressed to the care of Captain La Rock, in a conspicuous manner, with instructions to deliver it to the ferryman of the plaintiff, at Coffeeville ferry. It was also proved to be the custom to deliver freight at the respective landings on the river, and that Coffeeville was more than half a mile distant from the landing.

On this evidence the Court charged the jury—That if the defendants delivered the coat to the clerk on board the steamboat Pilot, and it came into the possession of Captain La Rock, the verdict should be for the defendants.

The plaintiff requested the Court to charge the jury—

First—That the custom on any one boat was no evidence of the custom of the river.

Second—That if the defendants agreed to deliver the coat at Coffeeville to the plaintiff, the jury should find for him in the absence of proof that it was so delivered, unless it was shown that the plaintiff had received it otherwise.

The first charge was refused; and with respect to the latter, the jury was instructed that it was true, that if the defendants agreed to deliver the coat to the plaintiff at Coffeeville, then, in the absence of such a delivery, he would be entitled to recover, but this question was not involved in the case, and if after the written agreement was entered into, the parties agreed that the coat should be delivered to Captain La Rock, and it came to his hands through the Clerk of the boat, the verdict ought to be for the defendants.

The plaintiff had previously asked the Court to exclude

Langford v. Cummings & Cooper.

from the jury the evidence which went to show that the verbal agreement was made after the one in writing. This was refused. The plaintiff excepted to the action of the court in these several matters, and now assigns the same for error.

J. J. PORTER, for the plaintiff in error, insisted that the receipt was evidence of a specific contract, and could not be explained by parol evidence. [Greaul. on Ev. 353; 6 Ohio Rep. 247.]

The evidence of the belief of the witness should have been excluded, as having nothing to do with the case, and the facts proved leading to no such conclusion. [7 Mass. 218; 5 S. and P. 421; 1 Phil. Ev. 291; Peak's Ev. 199.]

COCHRAN, contra.

GOLDTHWAITE, J.—First—We think we are not authorized to infer that the witness was permitted to give his impression as evidence to the jury. It is clear the plaintiff endeavored to show by his cross examination that there was no foundation for such an impression. In addition to the cross examination, it would have been proper for the plaintiff to have asked instructions from the court to the jury, that their verdict ought not to be founded on the belief of the witness. No exception was made to the evidence, if it was so considered, nor any charge asked upon it. Consequently there is no question about it raised on the record. [Toulmin v. Austin, 5 S. and P. 410.]

Second—The motion to exclude such of the evidence as went to show that the verbal agreement was made after that in writing, could have been allowed only upon the reason that the contract evidenced by the receipt could not have been modified or changed by a subsequent verbal agreement. We do not wish to be understood that, if the proof that this agreement was subsequent, was nothing more than the belief of the witness, that then it might not have been excluded, but such was not the request; the prayer was to exclude the evidence, and it was all of such a nature as to warrant the conclusion that the agreement to forward the coat by a particular boat, was the last conversation between the parties.

It is insisted, however, that the receipt was an express contract to deliver the coat to the plaintiff at Coffeerville, and that this contract could not be modified by any subsequent verbal agreement. We cannot yield our assent to this proposition. The mode of delivery was a matter entirely for the benefit of the plaintiff, and an acceptance by him in a different manner would be a discharge to the defendants. When, therefore, the plaintiff consented that the coat should be delivered to the Captain of the steamboat, the delivery, if it was subsequently made, was, in effect, a delivery to the plaintiff himself. The case of *Cuff v. Penn*, [1 M. and S. 31,] is similar in principle to this, and is a sufficient authority to shew that a written contract, fixing a stated period for its performance, may be extended by parol; and, if so, there is no reason why the place of performance may not also be changed in the same manner.

3. The charge with respect to the custom seems to have been asked without any foundation for it, growing out of the evidence. It is stated that the custom was proved; now this statement is incorrect if it was only shown to be the custom of one boat. There is no manner in which this request can be considered which relieves it from the character of a mere abstraction, which the court was not bound to respond to in any manner.

4. We are not called on to determine whether the written contract imposed the risk upon the defendants of a delivery at Coffeerville, because the County Court conceded such to be the law of the contract, and it very distinctly put the case to the jury upon the fact whether a subsequent verbal agreement was made, by which the coat was to be delivered to Capt. La Rock. The charge of the Court left the jury to consider whether the coat came to his hands, and we are unable to perceive any error in the judgment.

Let the judgment be affirmed.

BROWN V. LANG ET AL.

1. A surety who pays a debt for his principal, is entitled to stand in the place of the creditor as to all securities, funds, liens and equities, which he may have against other persons or property on account of the debt.
2. B. at the request of L. indorsed a note made by M. & L. as partners, which was discounted by a Bank; after the death of L. his administratrix and M. made a new note, for the purpose of continuing the indebtedness, which was also indorsed by B. and discounted by the Bank. This last note being unpaid, the Bank recovered a judgment against B. on his indorsement, which he satisfied, and filed his bill to charge the estate of M. upon the allegation that L. and the administratrix were insolvent.

HELD—1. That the purchase of the second note by the Bank, relieved the intestate's estate from all liability to pay the debt.

2. The complainant was not entitled to the relief sought, that his only equity so far as the intestate's estate was concerned, was to subject the interest of the administratrix and surviving partner therein, (if any,) to the payment of the amount paid as their indorser.

THE plaintiff in error filed his bill in the Court of Chancery holden at Mobile, setting forth that on the 18th March, 1837, at the request of Willis Lang, who was then a copartner in trade with Colin C. McRae, under the firm of McRae & Lang, he indorsed a promissory note, made by the concern, for twelve hundred and twenty-five dollars, which was duly discounted by the Bank of Mobile. Before the maturity of the note Lang died, and administration of his estate was granted to Catharine Lang, his widow, by the Orphans' Court of Mobile. To enable the administratrix to renew and continue the indebtedness to the Bank, so commenced by McRea & Lang, the complainant, at the request of Mrs. Lang, repeatedly indorsed the note of herself and McRae, and the note of McRae & Lang was thereby extinguished. The last renewed note indorsed by the plaintiff was dated the 9th May, 1838, and was due the 7th July thereafter; this note not being promptly paid by the makers, was put in suit, and judgment recovered thereon against McRae and Mrs. Lang, in her individual character, as also against the complainant.

It is further stated that the makers of the note were insolvent, and the plaintiff, to save his property from execution and sale, has fully paid off the judgment against him, together with

all interest and costs. Mrs. Lang, as administratrix, refuses to reimburse the sum thus paid, although the complainant first indorsed for, and at the request of, the intestate, and repeated his indorsement at her solicitation, to relieve his estate from a liability to execution.

The bill prays that the money paid by the complainant may be considered as a charge upon the intestate's estate, that the amount may be ascertained by a reference to the Master, and the administratrix be decreed to pay it; and in default of payment by her, that an execution issue against the estate of her intestate.

McRae and Mrs. Lang are both made defendants. The former answers that his deceased partner being under protest to the Bank of Mobile, as the indorser of one Collins, to relieve the credit of the firm, he united with him and made a note, which the complainant indorsed; this note was repeatedly renewed by this defendant and Mrs. Lang, (after the death of her husband,) as makers, and the complainant as indorser; and a judgment rendered upon the note last made has been paid by the complainant as an indorser.

Mrs. Lang demurred to the bill for want of equity, and answers that, not admitting her intestate had "any thing to do with the original note as set forth by the complainant, or had any benefit therefrom, or assented to the making thereof." She prays proof of all these facts, if they are material.

Upon the application of the complainant for a commission to take the deposition of McRae to be read against his co-defendant, interrogatories were filed and a commission issued accordingly. The testimony of McRae is substantially a reiteration of the facts stated in his answer.

The Chancellor was of opinion that the bill did not disclose a case for equitable interference, and consequently dismissed it at the complainant's costs. To revise this decree a writ of error has been prosecuted to this Court.

DARGAN, for the plaintiff in error. By the payment of the judgment recovered by the Bank, the plaintiff was substituted to all the rights to which the Bank was previously entitled. If the debt had been paid by the indorser without suit, the indorser would have been entitled to the note; and upon the

same principle, having paid it after judgment, he is authorized in equity to control the judgment against the makers. [1 Turner and Russ. Rep. 224; 8 Cond. Eng. Ch. Rep. 338, 344; 1 Law Lib. 150; 2 Vern. Rep. 608; 14 Ves. Rep. 162; 1 John. Ch. Rep. 413.]

The intestate was originally liable as a maker of the note to pay it, so as to relieve the plaintiff, and upon principles of natural justice, his estate is chargeable, as the renewed indorsement was intended to save it from execution and sale. The case of ———, [2 N. C. Ch. Rep. —,] very fully establishes this principle.

Mrs. Lang, as administratrix, gave her own note to pay intestate's debt, and thus became a creditor of the estate to that extent. The law is well settled that a trustee who advances his own money for the benefit of the trust, is entitled to be reimbursed from the trust funds; and it is not competent for a trustee to refuse to collect his debts, or to release them to the prejudice of his creditors. If a creditor is unable to obtain a satisfaction of a judgment by execution, he may resort to equity to subject a debt due to the defendant. [4 Rand. Rep. 394; 4 John. Ch. Rep. 313.]

CAMPBELL, for the defendant. Brown cannot claim on the note—that imposes an obligation on Mrs. Lang alone; in fact it was not competent for her to charge the estate by giving a personal security. [6 Mass. Rep. 158; 8 Mass. Rep. 199.]

If the plaintiff has any right to claim a reimbursement of his advances, it is by being subrogated to the situation of the Bank upon the original contract; but this cannot be, for the bill expressly charges that that contract "was extinguished" by a new note. The legal effect of a renewal of a note in Bank is entirely to satisfy the indebtedness upon the old paper. The discount is made upon the new note, and the amount placed to the credit of the borrower, while the Bank obliges him to settle the old note by the application of the money so lent. [2 Gill. and J. Rep. 494, 509.]

Brown cannot claim on the security we have seen, because, as we have shown, that has lost its vitality; and if subrogated to the rights of the bank, he cannot subject the estate of

the intestate to his reimbursement. [8 Eng. Ch. Rep. 338; Foster v. The Athæneum, 3 Ala. Rep. 302.]

The fact that Mrs. Lang borrowed money to pay the debts of the estate, does not make the estate the debtor of the lender, and equity would not, if all the parties to the note had been insolvent, have sustained a bill at the suit of the Bank, as the creditor of Mrs. L. against the assets in her hands. Chancery possibly would entertain a suit, such as the present, for a separation and settlement of the interest of the administratrix in her husband's estate. But such is not the scope of the bill. The claim is set up on the isolated ground, that the debt which the plaintiff indorsed, in its inception, bound the estate of Willis Lang, and that it should be paid from its means, though, by the assent of all parties, its character has been entirely changed. In this view, it is clear the equity of the bill cannot be sustained. [8 Ves. Rep. 8.]

COLLIER, C. J.—The object of the plaintiff's bill is not to obtain an assignment of the judgment recovered by the Bank against McRae and Mrs. Lang. If that judgment was distinct from the judgment rendered against the plaintiff, or was not satisfied by the payment of the latter, it would be entirely competent for Chancery to direct it to be transferred upon a bill exhibited with a view to such a result. [Creager v. Bengle, 4 H. and John. Rep. 234; Watts v. Kinney, 3 Leigh. Rep. 272.] But the assumed equity of the bill is, that the plaintiff, as the indorser of Mrs. Lang, &c. has paid a note, which had been substituted for a note of her intestate, &c. on which he was also an indorser, and the makers of the note are unable to reimburse the amount paid. It is not pretended that it is competent for an administrator to impose a direct liability upon the estate he represents, by executing a note or other security for money, in his representative character; but it is insisted, that as by the substitution of the note which the plaintiff has paid, the estate of the intestate has been relieved from a liability *pro tanto*, in equity and natural justice, it is bound to refund him the amount advanced. It is a settled principle, that a surety who pays a debt is entitled to stand in the place of the creditor as to all securities, funds, liens and equities which he may have against other persons or property on account of the debt.

[1 Story's Eq. 477 *et post*; Hampton v. Levy, 1 McC. Ch. Rep. 112; Worthington v. Ferguson, 4 H. and John. Rep. 522; Tankersley v. Anderson, 4 Dess. Rep. 44; Miller v. Pendleton, 4 H. and Munf. Rep. 436.] And it is equally clear, if a creditor cannot obtain satisfaction of a judgment by execution he may resort to Chancery to subject a debt due to the defendant, or property to which he has an equitable title.

In the case before us, the Bank was the creditor to whom the debt was due and has been paid. The intestate of Mrs. Lang, together with his copartner, were originally debtors, but that indebtedness was fully paid by the discount of the substituted note and an appropriation of its proceeds; and the evidence of it, in the language of the bill, *was extinguished*.

This being the case, Mrs. Lang and McRae became the debtors; and it is a debt for the payment of which they alone were responsible, as makers of the note. There is nothing in the record from which it can be inferred that the Bank did not intend to discharge the intestate's estate from all liability to pay the note of which he was a joint maker; and we cannot, against the direct allegation of the bill, suppose that there was a continuing responsibility. The creditor then, could not have proceeded, either at law or in equity, to charge the estate of the intestate, in the hands of the administratrix; and the surety whose claim is deduced through the creditor, cannot look to any source of reimbursement of which the latter could not have availed himself.

The Bank does not appear to have had any other security for the debt due to it than the last note, which was indorsed and paid by the plaintiff; and the principles we have stated do not, under this aspect of the case, authorize him to seek a repayment save only from the parties who preceded him on the paper. If the judgment against the makers of the note was not discharged by the payment made by the plaintiff, then as we have already said, a transfer of that judgment might be enforced in equity. So the plaintiff might maintain an action at law, for money paid, &c. or if a reimbursement could not be obtained of either of the defendants at law, he might resort to equity, and there reach debts due to either of them, or subject other property to his indemnity.

It is certainly true, that by relieving the estate of her intes-

tate from the payment of the note made by him and McRae, Mrs. Lang, upon proof of the insolvency of the latter, was authorized to charge the estate with the amount of the substituted note; and that sum would be allowed her on the settlement of her administration accounts. The plaintiff might, in equity, coerce a settlement of the intestate's estate, cause its division and distribution, and obtain a decree for the appropriation of the interest of both, or either, of the defendants to the extent of his advance. If, upon the settlement, nothing should appear to be due to the administratrix, although she may have wasted the estate, the plaintiff would not be entitled to recover anything: the more especially as the sureties in her administration bond, who are entitled to equal favor, would be answerable for her default. This conclusion is also enforced by the consideration that the intestate's estate was not the debtor of the plaintiff, but its administratrix was, and through her only as its creditor or distributee can it be resorted to.

From what we have said it is sufficiently shewn that the plaintiff cannot proceed against the estate of the intestate upon the ground that the intestate was originally liable; but his only ground of equity against it, is through either of the defendants as a creditor, or distributee. The bill was not framed with a view to such relief, but upon a hypothesis materially different, and, as we have seen, wholly untenable.

The subject matter of the bill not embracing what we have shown to be the equity of the plaintiff, the decree of dismissal will not bar a suit founded upon that equity, if it can be sustained by proof. [Story's Eq. Plead. 608.]

Our conclusion is, that the decree must be affirmed.

COTTON v. HUEY & Co.

1. A suit commenced by attachment is within the law forbidding process, &c. to be served on Sunday.
2. When an attachment is levied on Sunday its service cannot be abated by plea. The proper course is to move the Court to set aside the process for irregularity.

ERROR to Talladega Circuit Court.

This action was commenced by attachment, by the defendants against the plaintiff in error.

The defendant pleaded in abatement of the service of the attachment, that it was levied on Sunday, without the oaths of two persons that the defendant intended to withdraw himself from the State under cover and protection of the first day of the week.

To this plea the plaintiffs demurred, and the Court sustained the demurrer.

Judgment being rendered for the plaintiffs, the defendant prosecutes this writ. and assigns for error the judgment of the Court on the demurrer.

CHILTON, for plaintiff in error.

The attachment law is included within the general terms of the law against vice and immorality, forbidding process to be served on Sunday, [Aik. Dig. 440,] and the proper mode of taking advantage of it is by a plea in abatement to the service. He cited 3d Johnson 250; 20th ib. 140; 8 Term Rep. 86.

RICE, contra, contended that the law did not apply to attachments, but that if it did, advantage could not be taken of it in this mode. The defendant should have moved to set it aside for irregularity.

ORMOND, J.—The act under which this plea was filed declares, in substance, that no one shall serve or execute upon Sunday, or the first day of the week, any “writ, process, or

der, warrant, judgment or decree," except in criminal cases, or for a breach of the peace, unless oath be made by two reputable persons, that the person on whom the process is to be served intends to withdraw himself and escape from this territory under cover and protection of the said first day of the week, commonly called Sunday, and that service on that day, without the oaths of two persons as aforesaid, shall be utterly void to all intents and purposes. [Aik. Dig. 440.]

We entertain no doubt that the Legislature intended to include in the prohibition all civil process. The terms employed are as comprehensive as the language affords, to include every description of civil process. The proceeding by attachment is as much a suit as if commenced in the ordinary mode, by *capias*, the warrant being by the attachment law declared the leading process in the suit. A similar statute in England has always received a liberal interpretation to advance the manifest design of the Legislature. [Taylor v. Philips, 3 East. 155.] The obvious design of the Legislature was to prevent the spread of vice and immorality by the desecration of the first day of the week to common secular purposes, unless justified by the necessity of the case. In addition we are clearly of opinion that the service of an attachment is within the letter of the prohibition.

We think, however, that the objection of the defendant's counsel, that advantage cannot be taken of it in this mode, must be sustained. The proper mode of taking advantage of any defect in process, or irregularity in the service, is by motion to the court to stay proceedings. [1 Sellon's Practice, 101.] This was in effect decided by this court in *Maverick v. Duffie*, [1 Ala. Rep. 433,] where it was held that a plea in abatement that no copy of the writ was served on the defendant was bad on demurrer, but that a motion should have been made to the Court to set aside the process for irregularity. This was the course pursued in the case of *Taylor v. Phillips*, cited from 2 East. 155, where the process was set aside because served on Sunday, under a statute like ours even after acts by the defendant which, if the service had not been absolutely void, would have been a waiver.

The impropriety of the course attempted in this case will be obvious when we consider the nature of a plea in abatement,

Chilton v. Comstock.

which must give the plaintiff a better writ. Now, here there is no objection to the writ, but an irregularity is complained of in its service. This is an objection which does not reach the writ, and therefore does not abate it.

It results from this examination, that there is no error shown by the record, and the judgment must be affirmed.

CHILTON v. COMSTOCK.

1. Where the maker of a promissory note, not negotiable in its terms, transfers an account upon another person to the payee, who agrees to take it as a payment subject to the sole condition that he is able to make it available, and he then transfers the note to an assignee, who sues the maker, and after suit brought, the payee makes the account available to himself, this is no defence to the suit by the assignee, under the pleas of payment and set off.

WRIT of Error to the Circuit Court of Benton county.

Assumpsit on a promissory note made by Chilton to McCampbell, and by him assigned to Comstock. Pleas, non assumpsit, payment and set off. Verdict and judgment for the plaintiff.

At the trial the plaintiff gave in evidence the note described in his declaration, which was indorsed in blank and is not payable in Bank.

The defendant then proved, that before the transfer of the note, McCampbell, the payee, had purchased from Chilton an account due from another person, for a greater amount than the note, and agreed the account should be a payment of the note, if he could make it available in a transaction between himself and that person.

After the transfer of the note to Comstock, and after suit was brought by him against Chilton, McCampbell had made the account so given to him available in the transaction which was contemplated at the time of the purchase of the account.

Chilton v. Comstock.

During the whole period, from the giving up the account to the close of the transaction, McCampbell had the possession of and control over the account, and never offered to return it to Chilton, who had proved it before he turned it over. The only condition in the contract respecting the account was that before stated.

On this evidence the defendant requested the Court, in effect, though not in terms, to instruct the jury that they ought to find a verdict for him. This charge the Court refused to give, but instructed the jury that the transfer of the account could only operate as a payment from the time when it was made available by McCampbell, and that if before it was so made available Chilton had notice of the assignment of the note to the plaintiff; in that event the subsequent use of the account by McCampbell was no defence to the action.

The defendant excepted to this charge, as well as to the refusal to give that which he requested.

PECK and CHILTON, for the plaintiff.

WALKER and RICE, contra.

GOLDTHWAITE, J.—It is evident that the account transferred by Chilton to McCampbell was not taken as an absolute payment, and in extinguishment of the note. The utmost effect of the agreement is, that the note should be taken as a conditional payment. The rule in such a case is, that the original liability is not impaired in any respect, and the plaintiff may sue on it without any return or offer to return the substituted paper. [Clark v. Young, 1 Cranch 181; Abercrombie v. Mosely, 9 Porter, 145; Trotter v. Crockett, 2 Porter, 413.]

It may be conceded that the same rules will apply to any defence to this action, which could be urged if McCampbell, the payee of the note, was the plaintiff. In that event the fact of receiving the money for the account, or using it so as to make it available, according to the contract, if this was effected after the institution of the suit, could only be shown in defence under a plea *puis darrien continuance*.

It is doubtless true, that under our statute, ordinary promissory notes are not negotiable in such a manner as to discharge them from any latent equity, even in the hands of a *bona fide*

The Branch of the Bank of the State of Alabama at Huntsville v. Marshall et als.

holder, without notice. [Smith v. Pettus, 1 S. and P. 107.] The only effect of the statute is to authorize the assignee to maintain a suit in his own name, and to protect him against any payment, &c. made to the assignor after notice of the assignment.

We are not prepared to say that the defendant in this case is without his remedy, if he is in a situation to sustain injury in consequence of the transfer of the note to the present plaintiff; but it is clear that the defence insisted on cannot avail him, because it would not have been available under the same state of pleadings against the payee of the note.

Let the judgment be affirmed.

BRANCH OF THE BANK OF THE STATE OF ALABAMA AT HUNTSVILLE v. MARSHALL ET ALS.

1. *Seemle*—An answer denying the matter charged in the bill, if uncontradicted, is conclusive evidence for the defendant; but the defendant must make out by proof matters stated by way of avoidance of the statements or charges of the bill.
2. An affirmation in the answer need not be proved, if responsive to the stating or charging part of the bill, or an interrogatory authorized by either of them; but if the bill contains *nothing more* than the *stating* part, with a prayer that the defendant may answer, the complainant is not compelled to receive the defendant's oath beyond the mere denial of the equity of the bill.
3. Positive answers, responsive to the bill are not outweighed by proof of facts which are not irreconcilable with the truth of the answers and the fairness of the matters they state: and the more especially where each material fact is related only by a single witness.

APPEAL from the Court of Chancery, sitting at Huntsville.

On the 28th February, 1837, the plaintiff filed a bill, in which it is alledged that the plaintiff is the legal proprietor of a bill of exchange, drawn by Wm. E. Phillips, on the 3d February, 1836, for the sum of twenty-one hundred dollars, on B. McKiernan, of New Orleans, in favor of Josiah W. Marshall, and indorsed by the latter. This bill was regularly protested for

The Branch of the Bank of the State of Alabama at Huntsville v. Marshall et als.

non-acceptance and non-payment, and the parties duly notified thereof. When it was drawn and indorsed Marshall resided in the county of Madison, but in October, 1836, he removed with all his effects to Tennessee, where he still resides. In September, 1836, the plaintiff brought a suit against him as indorser of the bill in the Circuit Court of Madison, which is still pending.

The bill also charges, that for the purpose of defrauding the plaintiff and other creditors, Marshall pretends to be insolvent and has made a fraudulent conveyance of all his property; that before leaving this State he sold a negro man, (a blacksmith,) to Samuel Jordan, of Limestone county, for the sum of twenty-one hundred dollars, and received his note therefor, payable in June, 1837. This note, for the purpose of defrauding Marshall's creditors, was made payable to his brother-in-law, Richard Neale, of Tennessee. The bill charges, that Neale was not present when the negro was sold, or the note taken, had no interest in the transaction, and knew nothing of it until it was consummated.

Phillips, Marshall, Neale and Jordan, are made defendants, and called on "full, true and perfect answers to make, to all the foregoing allegations, as fully and particularly as if the same were herein again repeated, and they more particularly interrogated thereto."

The bill prays that an injunction may issue to restrain Jordan from paying to Neale, or Marshall, the sum due on the note, and that he be decreed to pay the same to the plaintiff, in satisfaction of the debt due to the Bank by Marshall, and concludes with a prayer for general relief. An injunction was awarded accordingly and the defendants Marshall, Neale and Jordan answered separately:

Marshall admits that that the bill of exchange, as alleged by the plaintiff, was drawn by Phillips and indorsed by him; admits that he sold the negro to Jordan for twenty-one hundred dollars, and took his note for the sum payable to Richard Neale, but denies that in so doing he was influenced by any fraudulent intent. He avers that some years previously he became indebted to Neale in a sum equal to twenty-one hundred dollars, for funds of Neale which he had used, and to secure this sum he caused the note of Jordan to be made payable to

The Branch of the Bank of the State of Alabama at Huntsville v. Marshall et als.

him; *further*, although Neale was not present, defendant, immediately after the transaction took place, informed him of it, and sent him the note. Defendant is informed, and believes, that Neale, soon after receiving the note, sent it to his brother, B. Neale, who was to act as his agent in its collection; admits that Phillips is insolvent, and claims the benefit of a demurrer.

Neale admits that Marshall sold the slave as alledged by plaintiff, to Jordan, for twenty-one hundred dollars, and took a note in his name therefor. He avers that Marshall was indebted to him in an amount equal to the note, or thereabouts, and promised to send him in payment the note of some solvent person, and accordingly sold the slave to Jordan, and in a short time thereafter sent the note in compliance with his understanding; and he accepted the same in satisfaction of Marshall's indebtedness. Defendant denies all fraud, and demurs to the bill.

Jordan admits the purchase of the slave, as alledged by the plaintiff, at a time when Neale was not present; that he owes the sum of twenty-one hundred dollars, due in June, 1837, which he is willing to pay as the Court may direct.

In May, 1840, the plaintiff filed an amended and supplemental bill, setting forth, that in April, 1837, a judgment was recovered in the suit at law against Marshall, for the sum of twenty-three hundred and sixteen dollars, besides costs; that execution had been sued out thereon and returned "no property found." The defendants omitting to answer this bill, it was taken as confessed in the spring of 1841.

The cause was tried at the term of the Chancery Court holden in June on the bill answers and proofs:

1. The plaintiff offered, under the amended and supplemental bill an exemplification of the suit at law showing the execution and return as alledged.

2. The deposition of B. Neale states that Richard Neale is his brother, and Marshall his brother-in-law, having married his sister. Witness had known but little of his brother for the last eight years; he was then in moderate circumstances. Between the 10th and 20th April, 1837, Marshall handed witness the note in question, stating that his brother had sent it to him to collect. R. Neale and Marshall lived in Tennessee,

The Branch of the Bank of the State of Alabama at Huntsville v. Marshall et als.

but a considerable distance from each other, and witness lived in the neighborhood of Jordan.

3. George W. Martin proves that Marshall was indebted to him, on the 1st March, 1837, six hundred dollars, by promissory note, and upon being called on for the money, promised to pay it as soon as he collected a note of Samuel Jordon for twenty one hundred dollars, the consideration of which was the sale of a negro blacksmith by the former to the latter.

4. George Connally proves the insolvency of Marshall and Phillips, and their removal from this State about 1837. They were considered good for their debts up to a short time previous to their removal.

The Chancellor dismissed the bill at the plaintiff's cost.

It has been suggested in this Court, that Richard Neale has died intestate, since the rendition of the decree by the Chancellor, and, by consent, William Robinson is made a party in his stead.

McCLUNG, for the plaintiff in error insisted, that in order to authorize a Court of Chancery to entertain this cause it was not necessary that Marshall should have been prosecuted to insolvency. If such were the law, the money might have been collected of Jordan and withdrawn from the jurisdiction of the Court before a judgment could have been obtained.

The allegation of fraud between Marshall and R. Neale is sufficiently shown by the proof. Their answers in alledging the transaction to have been founded on a sufficient consideration, and dictated by good faith are irresponsible to the bill, and are not, in the absence of proof in their favor, entitled to consideration.

ROBINSON, for the defendant. The proof of fraud is wholly insufficient to disprove the positive and direct denials of the answers. But if the proof was ample, then it is insisted that the plaintiff prematurely sought a remedy in equity; that the legal remedies were not exhausted. [3 Porter's Rep. 392, 473; 4 John. Ch. Rep. 671, 681, 691; 4 Munf. Rep. 540; 3 Paige's Rep. 311.]

The Branch of the Bank of the State of Alabama at Huntsville v. Marshall et als.

COLLIER, C. J.—The bill alleges a fraud on the part of the defendant, Marshall, in causing the note given by Jordan upon the purchase of the negro, to be made payable to Neale, who was the brother-in-law of Marshall, and to whom the latter was not indebted. And the first question we propose to consider is, whether the answer of Marshall, so far as it negatives a fraud, and his answer and Neal's, affirming an indebtedness by the former to the latter, is to be received as evidence until overbalanced by other testimony.

It is stated in general terms, in many adjudged cases, that where a general replication is filed and the parties proceed to a hearing, all the allegations of the answer, which are responsive to the bill, shall be taken for true, unless they are disproved by two witnesses, or by one witness with pregnant circumstances. [Fenno et al v. Sayre & Converse, 3 Ala. Rep. 478, and cases there cited.] And if a bill charges a fraud, a responsive answer, denying the fraud, if uncontradicted, is conclusive evidence for the defendant. [Murray v. Blatchford, 1 Wend. Rep. 583; Cunningham v. Freeborn, 3 Paige's Rep. 557.] But as a *general rule*, the defendant must make out by proof what he insists upon by way of avoidance of the statements or charges of the bill. [Woodcock v. Bennett, 1 Cow. Rep. 743-4 and note; Lucas v. The Bank of Darien, 2 Stew. Rep. 280; Hogthorp v. Gill's admr's, 1 Gill. and J. Rep. 272; Paynes v. Coles, 1 Munf. Rep. 373.]

An affirmation in the answer need not however be proved, if it be responsive to the stating or charging part of the bill, or an interrogatory authorized by either of them; [Fenno et al v. Sayre & Converse, 3 Ala. Rep. 478,] for in such case the complainant has, by the frame of his bill, engaged to prove the negative. He has voluntarily assumed the *onus*, and cannot complain of the difficulty of the task he has undertaken. The complainant, in the formation of his bill, may at his election make as much or as little use of the defendant as he pleases, except that, according to the established course of Chancery, he must receive a direct denial of his allegations by the defendant as evidence, as well as pleading. Responsive affirmations by the defendant, are most usually invited by the charging part of the bill, which is a negation of what are supposed to be the defendant's pretences, or by the extended scope of the

The Branch of the Bank of the State of Alabama at Huntsville v. Marshall et als.

interrogatories. Neither of these it is said are essential parts of the bill, but are usually inserted, if with any definite object, to obtain a more particular disclosure from the defendants. If the bill contains the stating part, with a prayer that the defendant may answer, omitting all charges and interrogations, the complainant will not be compelled to receive the defendant's oath beyond a mere denial of the equity of his bill. [See 2 Mad. Ch. Prac. 137; *Partridge v. Haycroft*, 1 Ves. 574; *Wakeman v. Grover*, 4 Paige's Rep. 23.]

In the case before us, the bill, in stating the complaint, directly avers a fraud on the part of Marshall, in taking the note of Jordan payable to Neale; and charges that no consideration moved from Neale to Marshall therefor, but the sole inducement of the latter in thus taking the note was to defraud his creditors. According to the principles we have laid down, the answer of Marshall in denying a fraud is evidence against the plaintiff, for it is a direct negative of the equity of the bill. In respect to the affirmation of Marshall and Neale, that the former was indebted to the latter in a sum equal to the amount of the note, it may be remarked that the bill not only alleges a positive fraud, but also charges that there was no indebtedness. Now if the bill had merely stated the fraud, the affirmative matter contained in the answer would have been regarded as pleading, the burthen of proving which would have rested upon the defendants. But such is not the case. The plaintiff charges the non-existence of a fact, and that charge can only be answered by an affirmation of its existence. Such in effect are the answers of Marshall and Neale, so far as they set forth the inducement to make Jordan's note payable to the latter, and according to the view which we have taken of the law, in this respect they are evidence.

The question now is, does the proofs taken by the plaintiff overbalance the weight which is due to the answers. The substance of all the testimony is about this: some eight years before the present suit was commenced, the defendant, Neale, was in moderate circumstances; Marshall, in April, 1837, handed a brother of Neale, residing in Jordan's neighborhood, the note of the latter to collect, with the remark that his brother had sent it to him for that purpose. Marshall became insolvent a short time previous to his removal from this State; and

Gibson v. Andrews.

in March, 1837, promised a man living in Tennessee that he would pay him six hundred dollars, as soon as he collected a note which he held on Samuel Jordan for twenty-one hundred dollars. The mere recital of this proof is sufficient to show, that it does not outweigh the positive asseverations of the answers. The declaration of Marshall, when called on by a creditor, that he would pay him from the proceeds of Jordan's note is inadmissible. *Prima facie* he had no interest in it, and any statement made by him in regard to it, could have no more influence than the declaration of any third person. There was nothing unusual in one brother sending to another a note to collect for him; especially when the latter resided in the immediate vicinity of the debtor. Nor can a debtor in failing circumstances be restrained in the preference of creditors where he does not interfere with pre-existing liens. But if the evidence was more direct and potent than it is, it might still be objected that the witnesses did not corroborate each other, but each bore testimony to distinct facts.

No question of law arises on the amended and supplemental bill for our consideration. And as it is unnecessary, we will not inquire whether the plaintiff prematurely resorted to equity.

It results from what we have said, that the decree of the Court of Chancery must be affirmed.

GIBSON v. ANDREWS.

1. The owner of a slave is under a moral and legal obligation to supply his necessary wants. While the slave remains under his protection, he is the judge of the extent of his wants, but cannot absolve himself from this obligation by voluntarily permitting the slave to be absent from him, unless he provides some person to stand in the relation of Master to the slave.
2. The hirer, where no agreement to the contrary is made, is responsible for medical services rendered to the slave during the period for which he is hired; but if such hirer should permit the slave to be absent from him, the owner would be responsible for necessary medical services as well as the hirer.

ERROR to the County Court of Mobile.

Gibson v. Andrews.

This action was commenced by the plaintiff in error before a Justice of the Peace, and having obtained a judgment the defendant appealed to the County Court.

It appeared in evidence that the plaintiff was a physician, and being at Pascagoula in Mississippi, attended on a slave of the defendant who was dangerously ill, and required the most assiduous medical attention, which was rendered to him—that there did not appear to be any one at Pascagoula whose duty it was to attend to said negro, the defendant being in Alabama. The defendant, when applied to for payment by plaintiff, declined to pay for the services rendered, alledging that one Field was responsible.

The Court, upon these facts, charged the jury that the plaintiff was not entitled to recover for the services, unless they were rendered at the request of the defendant; to which the plaintiff excepted.

The charge of the Court is assigned for error.

STEWART, for plaintiff in error.

DARGAN, contra.

ORMOND, J.—The master being entitled to the entire services of the slave, is under both a moral and legal obligation to supply his necessary wants. Of the extent of these wants, while under his protection, he is himself the judge. This duty which he owes both to the slave and the community, he cannot absolve himself from, by voluntarily permitting him to be beyond his control, unless he provides some person to stand in the relation of master to the slave.

In the case of Fisher and Johnson v. Campbell, [9th Porter, 210,] this obligation of the master is said to be similar to that of a father to support his children, and we then held that a master might, under peculiar circumstances, be liable for necessities furnished to his slaves without his knowledge or consent, and there can be no doubt that medical services, when the necessity for relief was urgent, would stand on the same footing.

The objection of the defendant that another person was bound to pay for the services rendered, refers no doubt to hirer of the services of the slave. There is no evidence that

Oden v. Rippetoe.

the slave was hired out to another person, but as the cause must be remanded, it is proper to consider the case in that aspect.

At an early period in the history of this court, [Meeker v. Childress, Minor, 109,] it was held, that where a negro was hired out, the owner was not liable for medical services rendered to the slave without his request, during the period for which he was hired. This decision appears to have been acquiesced in since that time, and may be considered as law. It must, however be confined to those cases in which the hirer retains the possession. The hirer could not, any more than the owner voluntarily permit the slave to be absent from him; and in such a case there can be no doubt that the owner as well as the hirer would be responsible for necessary medical services rendered to the slave. The master cannot, by his contract with another, absolve himself from the obligation he is under to the slave and the community to afford him protection and provide for his necessary wants in sickness or old age.

The statement in the record is, that there was no one at Pascagoula whose duty it was to take care of said negro. In such a case we entertain no doubt that the owner of the slave is responsible for necessary medical attendance.

The Court therefore erred in its charge to the jury, and its judgment is reversed and the cause remanded.

ODEN v. RIPPETOE.

1. Evidence of an offer on the part of the defendant in execution to transfer his property to another for the purpose of delaying creditors, cannot be given in evidence to affect the claimant who subsequently purchased the same property from the defendant in execution.
2. Nor is such evidence admissible with the limitation that it shall only affect the claimant, if subsequent evidence will authorize the jury to infer that the claimant received the property under the same circumstances.

Oden v. Rippetoe.

WRIT of Error to the Circuit Court of Talladega county.

Trial of the right of property levied on by virtue of an execution at the suit of Rippetoe against William T. Stubblefield and claimed by Oden.

At the trial of the suit, the slaves were shown to have been in the possession of Oden, under a sale from Stubblefield, at the time of the levy.

The plaintiff then offered to prove that a short time before the sale of the slaves to Oden by Stubblefield, the last named person had offered to convey them to the witness, who spoke of the transaction for the purpose of preventing them from being sold under executions, upon judgments which Stubblefield said were about to be obtained against him. Oden was not present when this offer was made, nor did the witness know that he knew or had ever heard of it. This evidence was opposed by the claimant, but was admitted by the Court, and an exception was taken.

It appears from the bill of exceptions, that this evidence was permitted to go to the jury, under the limitation that if they, from any thing subsequently shown in evidence, could properly infer that Oden had received a deed under similar circumstances, this evidence would be legitimate, but not otherwise. Much other evidence was before the jury which is unnecessary to be stated, as the opinion of the Court is founded on the question of admission merely.

A verdict and judgment having been given against the claimant, he seeks to reverse the judgment, alledging the admission of this evidence to be erroneous.

RICE and PECK for the plaintiffs in error.

CHILTON, contra.

GOLDTHWAITE, J.—It is not easy to perceive what legal influence could be exerted upon this case, by the evidence admitted, even when the utmost weight is accorded to the limitations under which it was permitted to go to the jury.

If it is conceded that the evidence subsequently admitted might lead the jury to the conclusion that the conveyance from Stubblefield to Oden was made for the purpose of delaying oth-

Carlisle v. The Cahawba and Marion Rail Road Company.

er creditors, the fact that others had been requested by Stubblefield to cover the property, would have no tendency to make any doubtful matter with respect to Oden's participation in the fraud more clear.

To render the sale from Stubblefield to Oden invalid on the ground of fraud, it was necessary to show that Oden participated in it.

The evidence admitted, goes no farther than to show an intention, or wish, on the part of Stubblefield, at a former period to cover his property, but has no tendency to connect Oden with him, either in intention or act. It is impossible to distinguish this from the case of *Jones v. Norris*, [2 Ala. Rep. 526,] in which evidence of the same description was irrelevant.

The judgment is erroneous for this reason, and is reversed, and the cause remanded.

CARLISLE v. THE CAHAWBA AND MARION RAIL ROAD COMPANY.

1. When a matter alledged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than the defendant, then the declaration ought to state that the defendant had notice; but it is otherwise where both parties are supposed to be alike cognizant of the fact.
2. In an action against a stockholder for instalments required to be paid upon his shares, it should be alledged by the company that the defendant had notice of the requisitions; but a general averment in the declaration, in these words, "of all which the defendant had notice," is sufficient on general demurrer.
3. Although the charter of a Rail Road Company authorizes a sale of the stock of a subscriber for the non-payment of calls made thereon, yet an action of *assumpsit* will lie upon his subscription, which is a promise to pay.
4. Where a legislative act does not *per se* confer corporate powers, but contemplates some act to be done by the company, as the election of officers, &c., the act required must be done, to entitle the corporation to maintain an action against a subscriber for stock—the subscription being made prior to the time of the organization for which the charter provided.

Carlisle v. The Cahawba and Marion Rail Road Company.

WRIT of Error to the Circuit Court of Perry.

This was an action of *assumpsit*, brought by the defendant in error to recover of the plaintiff seven instalments of five per cent. each, on five hundred dollars in stock subscribed for in the Rail Road of the Company. The declaration contains three counts, the character of which will sufficiently appear from the opinion of the Court. A demurrer was filed to the entire declaration, which was overruled, and thereupon the defendant pleaded—1. *Nul tiel corporation*. 2. *Non assumpsit*. On both of which issue was joined and the cause submitted to a jury.

On the trial the defendant excepted to the ruling of the presiding Judge. The plaintiff offered in evidence an act of the Legislature of this State entitled “an act to incorporate the Cahawba and Marion Rail Road Company,” approved January 18th, 1834; and further produced a written agreement, as follows: “We whose names are here underwritten, promise and oblige ourselves to pay at such times, or in such instalments, and in such manner as the President and Directors of the Cahawba and Marion Rail Road Company may from time to time prescribe and direct, the amount or number of shares of stock in the said company which we have set down opposite our respective names.” The agreement was dated 20th March, 1837, and among many others the name of the defendant was thereto subscribed, opposite to which was the following: “\$5, (five ss,) \$500 dolls.”

It was also shown from the books of the Company that the several instalments or assessments sued for, were made as stated in the declaration; but no proof was adduced of any demand of, or notice thereof, to the defendant previous to the commencement of this suit. Here the plaintiff closed its testimony, and the defendant offered none.

The defendant's counsel moved the Court to charge the jury, that in addition to the production of the charter and the written agreement, the plaintiff should have proved its regular organization according to the act. *And further* that the plaintiff should have proved a notice or demand of the several instalments sued for before the issuance of the writ. *And lastly*, the defendant moved to exclude from the jury the written agree-

Carlisle v. The Cahawba and Marion Rail Road Company.

ment because it was incorrectly described in the declaration. All of which several motions were overruled, and the Court instructed the jury that no other proof of the corporate character of the plaintiff was necessary but the production of the charter and the written agreement; and no proof of notice or demand of the several instalments sued for, was necessary to entitle the plaintiff to recover; and further, the agreement was admissible evidence under the declaration.

A. GRAHAM, for the plaintiff in error. The demurrer to the declaration should have been sustained because it does not allege that the defendant had notice before suit brought, that the several instalments or assessments had been called for by the company; and the same remark will apply to the refusal to instruct the jury on this point. [1 Chit. Plead. 360.] The 4th section of the charter would seem to render a demand necessary before suit brought; and this would seem to be more especially necessary, when it is recollected that the written agreement does not bind the defendant to pay the stock subscribed by him to any particular person. Besides the defendant, according to the terms of the charter, was not a corporator at the time he signed the agreement—the first section of the act making such only, those persons whose names are mentioned, together with their associates.

The written agreement was not described according to its legal effect, and should have been excluded under the *general issue*.

Lastly; the act of incorporation and agreement were not in themselves evidence that the plaintiff had become organized as a corporate body, and until this is done they have no right to require instalments to be paid on stock. [See §4 of charter, passed in January, '34.] The agreement does not admit the organization of the corporation; and there can be no pretence for saying that the defendant is estopped by his signature from requiring additional proof of its corporate powers. He cited 13 John. Rep. 38; 18 ib. 137; Chitty on bills, 159; 8 Wend. Rep. 480; 1 Ala. Rep. N. S. 241.

H. DAVIS and B. F. PORTER, for defendant. The charter creates a corporation, without requiring any further act in order

Carlisle v. The Cahawba and Marion Rail Road Company.

to authorize it to demand or sue for stock subscribed to the rail road. If the charter required other acts to be done in order to confer corporate powers, it is admitted that the performance of these acts should be replied and proved in answer to the plea of *null tiel corporation*. [18 John. Rep. 137; 9 Cow. Rep. 204, *et post*.]

The agreement sued on admits the corporate existence of the plaintiff below. [14 John. Rep. 238.] But if this be not so, the act of incorporation was quite sufficient. [2 N. Hamp. Rep. 310; 18 John. Rep. 137; 9 Con. Rep. 203.]

The terms on which defendant made his subscription did not contemplate a notice, and no personal demand was necessary. Besides, the agreement made the President and Directors agents of the defendant and a notice to them, was a notice to him. [Ang. and Ames on Corp. 204.] Further, the defendant is a corporator, and must take notice of the acts of the President and Directors, and may, if he will, be informed of them. [1 Chit. Plead. 360; Arch. Plead. 91; 1 Sand. Rep. 117, note 2.]

The agreement is in legal effect a promissory note, and the second count is good, [14 John. Rep. 238; 9 ib. 217,] though it does not alledge a demand or notice. If a note is payable on demand, the bringing a suit is a sufficient demand.

It sufficiently appears from the defendant's contract, that the payment for the stock is to be made to the plaintiff—but if the contract is incomplete in this respect, it is sufficiently aided by averments which are entirely allowable.

The subscription of the defendant for stock made him liable to the action of the plaintiff for the failure to pay for it. [Ang. and Ames on Corp. 304–5; 2 N. Hamp. Rep. 380; 1 Caine's Rep. 381; 5 Mass. Rep. 80; ib. 497; 10 ib. 327; 1 Binney's Rep. 70; 9 John. Rep. 217.]

COLLIER, C. J.—The first count of the declaration alleges that the plaintiff became a body corporate by an act of the legislature, approved on the 18th January, 1834, that the defendant, on the 20th March, 1837, with numerous other persons subscribed and executed a certain instrument in writing, whereby he promised to pay the plaintiff at such times, in such instalments and in such manner as the President and Directors of the corporation might prescribe and direct the amount or

Carlisle v. The Cahawba and Marion Rail Road Company.

number of shares of stock in the company which the defendant then and there set opposite his name. It is then averred that he set opposite his name five shares at one hundred dollars each, to be paid for according to the terms of the agreement. *Further*, that instalments were required to be paid on the stock subscribed, at different times and places, particularly stated, amounting in the aggregate to the sum of two hundred and fifty seven 50-100 dollars; of all which the defendant had notice. The Court then concludes with a deduction of the defendant's liability; his promise to pay, and an allegation of his non-payment.

The second count declares upon the agreement as a promissory note, alleges generally the repeated requisitions of the plaintiff on the defendant's stock, amounting in the aggregate to two hundred and fifty-seven 50-100 dollars, the non-payment of the instalments, but does not aver a demand or notice.

The third count is for stock sold and delivered, in consideration of which the defendant agreed to pay the plaintiff the sum of five hundred dollars.

The defendant did not demur to the counts separately, but objects to the declaration generally, that it is not explicitly averred that the defendant had notice *previous to the commencement of the suit*, that he was required by the President and Directors of the Company to pay any instalment upon the stock subscribed by him. True it is not alleged *in totidem verbis* that the defendant was *then* informed of the requisition which was made upon him, but the first count, after stating the different calls made upon the defendant for instalments, avers "of all which defendant had notice." This is *substantially* sufficient, conceding a demand, or notice, necessary to be averred and proved. If special demurrers were tolerated, perhaps greater particularity in pleading would be required, but matters of form are to be disregarded, as it is expressly declared by statute that all demurrers shall have no other effect than general demurrers.

In respect to the necessity of alledging and proving a notice, the rule is thus stated: when the matter alledged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than the defendant, then the declaration

Carlisle v. The Cahawba and Marion Rail Road Company.

ought to state that the defendant had notice thereof. But where the matter does not lie more properly in the knowledge of the plaintiff than the defendant, notice need not be averred. [1 Chitty's Plead. 360.] Testing the case by this rule, and we think it clear that notice of a call for instalments upon the stock is a necessary allegation. The times, amount of instalments, and manner of payment, were all to be prescribed by the President and Directors of the corporation, depended upon their volition and action; and consequently was more properly within their knowledge. It was competent for the defendant from time to time to have made inquiries of them and to have sought an examination of the books which they kept, yet he was under no greater obligation to have done this than is the drawer or indorser of a bill to inquire if it has been honored by the acceptor.

We will not undertake to say what evidence is necessary to charge the defendant with notice, or whether it may not be inferred from other facts, because there is nothing in the record to show that any proof was adduced to the point.

According to the view we have taken, the first count is good and this is enough to have authorized the Court to overrule the demurrer *in toto*, as it did not object to the counts separately.

The idea that the writing subscribed by the defendant is not correctly described, is not well founded. The first count, if it does not set it out literally, certainly describes it according to its substance and effect. Besides, although the Judge instructed the jury that the agreement was evidence, under the declaration, it does not appear that its admissibility was objected to by the defendant at the trial.

The act incorporating the plaintiff provides that the President and twelve Directors designated by name, "and their associates and successors in office shall be a body politic and corporate by the name and style of the Cahawba and Marion Rail Road Company, with the usual powers. That the President and Directors shall continue in office until the first day of January, 1835, and until their successors are elected and qualified: and shall cause books to be opened, &c. for the subscription of stock, which stock, so subscribed, shall be divided into shares of one hundred dollars each." *Further*, the stockholders shall

Carlisle v. The Cahawba and Marion Rail Road Company.

meet at Cahawba, on the first day of January, 1835, and elect thirteen Directors from among themselves, one of whom shall be chosen President; and annually thereafter, there shall be an election of the same officers. *Again*: "That the President and Directors, when they shall have organized agreeably to this act, shall have power to borrow money, contract debts, and be contracted with, upon the credit of the stock thereof, and to pledge personal or real estate for the payment of their debts, and to appoint such officers, agents and servants as they may think necessary, and give them such compensation as they may conceive just. They may require such instalments to be paid upon the stock as they may think best for the interest of the said company; and on failure of any stockholder to pay the amount due upon his, her or their stock, in pursuance of any call made by the President and Directors, as aforesaid, within sixty days after such call, the President and Directors shall be authorized to sell said stock: *Provided*, the same can be sold at not less than par value, for the amount so due; and the said stock shall be deemed and considered in law as private property."

In *Beene v. the Cahawba and Marion Rail Road Company*, [3 Ala. Rep. N. S. 660,] it was decided, that although the charter in question authorizes the sale of stock at its par value to pay what may be due thereon by the stockholder, yet upon an agreement, such as that sued on in the case before us, an action of *assumpsit* may be maintained.

It is needless to consider the character of the pleas, since it is clear they throw upon the plaintiff the *onus* of proving every thing necessary to sustain the action.

The defendant, by his subscription of stock, admits nothing more than the charter of the corporation asserts; and if that contemplates some further act to be done before a requisition may be made upon the subscribers for payments upon their stock, or before they are liable to suit, that act must be shown to have been done. The fourth section, which we have cited *in extenso*, invests the President and Directors with authority to require such instalments to be paid upon the stock as they may think best for the interest of the said Company," "when they shall have organized agreeably to this act." What is meant by organizing is clearly pointed out, to wit: the assem-

Lesne v. Pomphrey.

bling of the stockholders and electing thirteen directors. To entitle the plaintiff to maintain an action against the defendant, and to recover the amount of calls made upon his stock, it should be shown that the meeting and election provided for by the charter did take place.

The powers of a corporation must always depend upon the terms and act of its creation. Some are made bodies politic, and entitled to exercise all powers conferred on them without any act done by its members, [10 Wend. Rep. 269,] while it is necessary for others to prove their existence, not only by the production of their charter, but acts of user, &c must be shown. As to the *quantum* of proof required in such a case it is impossible to lay down a rule, applying alike to all cases; it must depend upon the statute to which the particular corporation owes its being. [3 Wend. Rep. 296.]

In the case at bar, it cannot be supposed that the organization of the corporation is inferable from the fact of the defendant's subscription, being made so long after the time when the stockholders were to have made their first election of Directors. The President and Directors appointed by the charter are expressly authorized to continue in office until their successors were elected and qualified, and in the absence of proof, it cannot be concluded that an election has been made.

It results, from a consideration of the questions raised, that the judgment must be reversed and the cause remanded.

LESNE v. POMPHREY.

1. An affidavit that "*some*" of the witnesses of the plaintiff reside out of the limits of the State, is not sufficient to authorize a commission to issue to take depositions.
2. When the Clerk omits to state what notice shall be given to the adverse party, of the time and place of taking it, the deposition cannot be read unless the party offering it prove that the notice actually given was sufficient.

Lesne v. Pomphrey.

ERROR to the County Court of Mobile County.

Action for a breach of covenant by the defendant against the plaintiff in error.

On the trial below, the plaintiff offered to read the deposition of certain witnesses taken in Louisiana, to the reading of which the defendant below objected because there was no affidavit of the materiality of the witnesses; the affidavit being "that *some* of the witnesses of the plaintiff reside out of the State of Alabama." Also, because the Clerk of the Court had not directed any or what notice should be given of the taking of the testimony, and that a notice given by the plaintiff's attorney, without the direction of the Clerk, was insufficient. The notice was given on the 2d June, 1841, to take the testimony in Franklin county, Louisiana, on the 7th of the same month. The Court overruled both objections, and the plaintiff had a verdict and judgment.

The assignments of error bring to view the admission of the deposition.

DARGAN, for the plaintiff in error.

CAMPBELL, for the defendant in error.

ORMOND, J.—The act authorising the deposition of an absent witness to be taken, is to the following effect :

"When a person who may be a witness in any cause, in any of the courts, shall reside out of this Territory, or shall, by reason of age or bodily infirmity, or any other cause, be incapable of attending to give his or her testimony in court, oath thereof being made to any Judge, Justice or Clerk of the Court where such suit is depending, such Judge, Justice or Clerk, is hereby empowered to issue, &c. *Provided*, that the party praying such commission, shall give such notice to the adverse party of the time and place, when and where, such commission is to be executed, as the Court, Judge, Justice or Clerk shall think proper." [Aik. Dig. 126.]

We think it quite clear that the act requires that the name of the witness whose deposition is proposed to be taken should be inserted in the affidavit. Unless this is done how can the Clerk issue a commission to take the deposition of the witness,

Boyd v. Mynatt.

the authority for doing which is the affidavit. The language of the act is, that upon affidavit being made, a commission shall be issued to take the testimony of "such witness." An affidavit that some of the plaintiff's witnesses reside out of the State, does not establish that the particular witnesses whose depositions were taken are in that predicament, and was therefore not sufficient to authorize the issuance of the commission to take their depositions.

The party taking such deposition is also required to give such notice of the time and place where the deposition is to be taken to the adverse party as the "Court, Judge, Justice or Clerk shall think proper." In this case, the Clerk issuing the commission did not state what notice should be given. In the case of *Parker v. Hagerty*, [1 Ala. Rep. 632,] the Clerk had omitted to require what notice should be given, but it was proved to the court that the notice actually given was sufficient, and we held that the deposition was properly read in evidence to the jury.

The notice given in this case was five days, and no attempt was made to prove that it was sufficient. This, under the authority of the case just cited, it was necessary the plaintiff should have done, as the Clerk, who is by law made the judge of the time to be given, it appears did not act.

The judgment must therefore be reversed and the cause remanded.

BOYD v. MYNATT.

1. It is no bar or defence to a bill, for an account and settlement of a partnership, that the defendant has been injured by the failure of complainant to perform his stipulations contained in the articles of copartnership. The defendant, in such a case, has his remedy by action at law on the articles. The practice in Courts of equity is to consider all stipulations in the articles, when not acted on by the parties, as if they were entirely omitted.

Boyd v. Mynatt.

WRIT of Error to the Court of Chancery for the fourth District of the Northern Division.

The bill exhibits the articles of partnership, containing the mutual stipulations of the several acts to be performed by the parties with respect to the business. The principal acts to be done by the complainant, were to supply a capital of one thousand dollars, the making of a tan yard, and the furnishing a hand to work in it. Those to be done by the defendant were to take charge of the yard, to use his best endeavors for the interest of the firm, and to teach the hand which the complainant agreed to furnish, the business in all its various branches.

The bill alleges that the partnership was carried on for some fifteen months, and states the items of account for which it is chargeable to the complainant. It also alleges the performance of all the stipulations on the part of the complainant, the non-performance of those stipulated by the defendant, who is charged with receiving all the effects belonging to the firm, and with refusing to settle or adjust the accounts, notwithstanding a dissolution had been agreed on.

The answer of the defendant admits the execution of the articles, and that the partnership was carried on for some months, but it denies that the capital stipulated for was supplied by the complainant, except the amount of two hundred and twenty-nine dollars. It also denies that the hand was supplied as agreed, except for a short period of time, after which he was put to other work by the complainant; and it also asserts that the principal work of erecting the yard, &c. was performed by the defendant.

The answer likewise insists on these grounds of defence:

1st. That a settlement of the transaction was had by a division of the partnership effects, and afterwards that the complainant sued the defendant in a court of law in Benton county, with regard to which the parties agreed that the suit should be dismissed and each party pay his own costs; the articles of agreement were to be given up by the complainant, who said he had left them at his residence. The defendant asserts that under this agreement, he paid his portion of the costs.

2d. That the failure of the complainant to supply the capital agreed upon, prevented the business from being profitably car-

Boyd v. Mynatt.

ried on, and that the defendant would have been a loser even if he had received all the effects of the firm to his own use. He therefore insists that this violation of the contract by the complainant is a reason why he should not be compelled to render any account of the partnership.

3d. That he was a minor when the articles of partnership were entered into.

The evidence taken in the cause, shows that the partnership was carried on under the articles, although it is certain the complainant did not furnish the amount of capital stipulated for, and omitted in some other matters to comply with his agreements.

The Chancellor considering none of the points made by the answer as sufficient to preclude an account between the parties, directed one to be taken upon certain principles ascertained by a decretal order. This account was taken, but the report of the Master was subsequently set aside, for reasons not important to be recited, and a new reference made. Under this another account was taken and reported, showing the defendant's indebtedness to the complainant in the sum of two hundred and ninety dollars, with interest from the 4th March, 1835.

Several exceptions were taken to this report, but they are unnecessary to notice, as the Chancellor concurred with the Master in his views of the account between the parties, taken with reference to the articles; but on a re-examination of the pleadings and proofs, the bill was dismissed, the Chancellor conceiving that the failure of the complainant to comply with the stipulations of the contract on his part, precluded him from calling for an account, the more especially as it satisfactorily appeared the business of the partnership could not be successfully prosecuted without a compliance with these stipulations. To reverse the decree the writ of error is now prosecuted.

W. B. MARTIN, for the plaintiff in error.

MOORE, contra.

GOLDTHWAITE, J.—This case was retained under consideration, because it was supposed to involve a principle en-

tirely novel, and with respect to which there seems to be an entire absence of decision.

The Chancellor dismissed the bill at the final hearing, because he considered the unsuccessful prosecution of the partnership business as owing, chiefly, if not entirely, to the omission by the complainant to supply the capital agreed by him to be supplied.

The default of the complainant in this, as well as in some other matters, may be conceded as sufficiently established by the proof, but yet it is clear the partnership was carried on under the articles for more than a year, and also that no settlement of the partnership transactions has been had with the assent of both parties.

Under these circumstances, if the complainant cannot enforce a settlement in equity, it is clear he is without relief. The decree dismissing the bill assumes that the complainant is not entitled to an account, because the defendant will not be more than compensated for injuries sustained by the complainant's neglect or refusal to comply with his covenants, even when he is permitted to retain all the joint effects shown to be in his hands.

We think this view cannot be sustained, and that if it was adopted it must lead to a practice which would prove exceedingly inconvenient. In most cases of bills for the settlement of partnership accounts, the defendant would insist on compensation for the breaches of the covenants contained in the articles, and the account of the partnership transactions, would be embarrassed or delayed with the inquiry into these damages, which all authorities agree must be ascertained by a suit at law. [Story on Part. 327.]

The practice established in courts of equity on this subject, is to read the articles of partnership, when they contain clauses which have not been acted on, as if these clauses were expunged, or were not inserted therein. *Jackson v. Sedgwick*, 1 Swanston, 460, 469; *Collyer on Part. B. 2, Ch. 2, §139, 2d ed.*]

In the application of this rule, no injurious results can ever flow, as the party injured by a breach of stipulations contained in the articles, always has an ample remedy at law, and can

 Reid v. Davis.

exert it equally as speedily as his adversary can obtain an account in equity.

The case of insolvency may present an exemption to this rule, but whether it does, is not necessary now to be determined, as it is not involved in this case.

The decree must be reversed, and as there was no action by the Chancellor upon the exceptions, it must be remanded in order that an examination may be made of the correctness of the Master's report.

REID v. DAVIS.

1. A contract for the sale and conveyance of land, evidenced by a bond, conditioned to make title at a future day, invests the purchaser with the right of entry; and though he has never taken actual possession, he cannot, on that ground, resist the payment of a promissory note, given for the purchase money.
2. A vendee of land may, after the expiration of the time within which the vendor has undertaken to make a title, demand the same and tender the purchase money, and if the vendor fails to perform his contract, by abandoning the possession he may rescind the contract of purchase. But the demand of the deed and offer to return the bond to the vendor, will not operate a rescission; unless there be something in the form of the contract making this sufficient.

WRIT of error to the Circuit Court of Lowndes.

This was an action of *assumpsit* on a promissory note made by the plaintiff in error, on the 11th November, 1837, for the payment, to the defendant, on the 1st of March, 1841, of the sum of three hundred and forty dollars. The cause was tried on the pleas of *non assumpsit*, failure of consideration and fraud. On the trial the defendant below excepted to the ruling of the Court. It was proved that the note declared on, was given for the purchase of a tract of land, by the defendant of the plaintiff, and that the latter had executed a bond to the former, conditioned to make him a title to the same as soon as a

Reid v. Davis.

patent therefor should be obtained from the United States. *Further*, it was proved by the defendant that he had demanded a deed for the land, of the plaintiff, who declined executing it, alledging that he had not received, and did not know when he should receive, the patent; that he procured the entry of the land to be made by his brother, who held the duplicate receipt therefor. The defendant then offered to surrender to the plaintiff his bond for titles, and give up the money which had been previously paid on his purchase, and rescind the contract, but to this the plaintiff would not assent. The defendant was not in actual possession at the time of the trial.

The plaintiff then exhibited a duplicate receipt for the land, in his own name, from the Receiver of public moneys at Demopolis, proved that the defendant had examined the land before and after the purchase by him, that it was situate in Alabama, wholly unimproved, and had never since the sale to the defendant been held adversely to him, or actually occupied by any one, but was at all times subject to the defendant's possession.

The Court charged the jury, if the land was unoccupied, or the defendant was undisturbed in his right to the possession, he might be considered as constructively possessed of it, and could not resist in an action at law, the payment of the purchase money on the ground that he was not in the actual occupancy. *Further*, that an offer by the defendant to rescind the contract and give up the plaintiff's bond for title could not avail as a defence at law.

The defendant's counsel moved the Court to charge the jury, that the refusal of the plaintiff to execute a deed when demanded was a fraud on the defendant for which he had a right to rescind the contract of purchase, which charge the Court refused to give. *And further*, that the defendant must have had a *possessio pedis* in order to estop him from resisting a recovery at law, which charge the Court refused to give, but charged the jury that if the defendant had or could obtain undisturbed possession at pleasure, he could not, for the want of an actual occupancy, defend himself at law against an action for the purchase money.

The jury returned a verdict for the plaintiff, for the amount

Reid v. Davis.

of the note and interest, and judgment was thereupon rendered.

T. WILLIAMS, for the plaintiff in error. There can be no necessity for going into equity to make the defence in a case like the present. The land had not been conveyed to the purchaser, but merely a bond for titles executed, and being uncultivated, the vendor could have no claim for rent, so that the offer to return the delivery bond, and its acceptance would place the parties in *statu quo*.

The seller undertook to make a title as soon as a patent could be obtained from the General Government, that is, within a reasonable time. That time had elapsed before the suit was brought; and the demand of a deed and the offer to surrender the bond put an end to the contract, even at law. [Cullum v. The Branch Bank at Mobile, during this term; Pitts v. Cottingham, 9 Porter's Rep. 675.]

R SAFFOLD, for the defendant in error. The contract of the vendor, obliged him to make title as soon as he received a patent from the United States; it appears from the evidence recited that he was a purchaser from the Government, and in the absence of proof to the contrary, it will be presumed that he had done nothing to prevent the issuance of a patent in the regular course of business. The vendor, then, could not by the demand of a deed, have been put in default for failing to make a title.

There is no pretence of fraud. The vendee has not been disturbed in the possession of the land, and will doubtless receive a title according to the terms of the contract he has accepted.

The notes for the purchase money are made payable at different times, without reference to the time when the title was to be perfected, and it is not now allowable to object to their payment, because the vendor has not made a deed in advance of the time stipulated for its execution. If the vendee can be relieved, (which is denied,) it must be in Chancery. The defendant's counsel relied upon cases cited for plaintiff, and in addition referred to Calaway v. McElroy & Flannagin, 3 Ala. Rep. N. S. 406; Steele v. Kinkle & Lehr, *ibid*, 352; Gibbs v.

Williams, *ibid*, 316 ; Clay and others v. Dennis, *use &c. ibid*, 375.

COLLIER, C. J.—1. The fact that the defendant below never was in the actual occupancy of the land which he had purchased, cannot relieve him from liability to pay the purchase money. His contract gave him the right of entry and enjoyment, and these invested him with the constructive possession. [Bliss' adm'r v. Yancey, 1 Ala. Rep. N. S. 273 ; Clements v. Loggins, 1 Ala. Rep. N. S. 622 ; Fitzpatrick et al v. Featherstone & McDougald, 3 Ala. Rep. 40.] It is not pretended that there was any adverse occupancy ; and this being the case, it was not incumbent on the plaintiff to put the defendant into the actual possession ; nor will the omission of the latter to take possession of the land, or its mere abandonment afterwards, operate a rescission of the contract. [Clay et al v. Dennis, *use &c.* 3 Ala. Rep. 375.] The charge of the Court on this point then, was unobjectionable ; it very properly supposed the contract to be in full force, and on that hypothesis informed the jury that the want of actual occupancy did not constitute a bar to a recovery.

2. The condition of the plaintiff's bond did not oblige him to complete the defendant's title by any definite time, but when he should obtain a patent for the land from the United States. This was an undertaking to do an act upon an event which would happen, but the time when was uncertain ; and before the obligor can be put in default for its non-performance, it must appear that the event has actually taken place, or has (at least,) been delayed by his act or omission. The evidence recited in the bill of exceptions does not show the plaintiff has done, or omitted to do, any thing to prevent the issuance of a patent according to the regular order of business in the Land Office ; and in the absence of all proof, we must intend that no fault is attributable to him. We must then suppose, that the demand of a title was premature, and its refusal under the circumstances can avail nothing. In Clements v. Loggins, [1 Ala. Rep. N. S. 622,] it was held that a vendee of land may tender the purchase money according to his contract, and demand title, and if the vendor refuses to make title, the vendee may abandon the possession and thus rescind the contract ; but

Reid v. Davis.

a mere abandonment of the possession is not of itself sufficient to rescind the contract. When the same case was before the Court subsequently, it was decided, that to entitle the vendee to a rescission of the contract, the tender of the money and the demand of title must be made after the day stipulated for making the title, has arrived. [2. Ala. Rep. 514; to same effect is *Steele v. Kinkle and Lehr*, 3 Ala. Rep. 352.]

In the case at bar, no tender of the purchase money was made, but a mere demand of a deed upon an offer to surrender the bond. If the defendant could, at his election, under any circumstances, rescind the contract for the refusal of the plaintiff to make a title, where the money was not tendered, a conclusion which we do not admit, he certainly could not in the present case, when the plaintiff was under no obligation to yield to his demand. Where the vendor of land executes a bond, conditioned to make title to the vendee generally, and the vendee, in consideration thereof, makes his note payable to the vendor on a day certain, the failure to complete the title is not in itself a bar to an action on the note. [George & George v. Stockton, 1 Ala. Rep. 136; *Stone v. Gover*, *ibid*, 287. And a vendee who holds the bond of his vendor, conditioned for the conveyance of title upon a future event, which has not happened, cannot occupy a more favorable position.

3. It is scarcely necessary to say, that as the plaintiff was not in fault for not making a deed when demanded, the refusal to execute it, was not such a fraud upon the defendant as authorized him to rescind the contract.

We are unable to discover any error in the proceedings of the Circuit Court, and its judgment is consequently affirmed.

Lacy v. Holbrook, Bowman & Co.

LACY v. HOLBROOK, BOWMAN & Co.

1. A plea admitting of two constructions will be construed most strongly against the pleader.
2. The terms "funds current in the city of New York," mean gold or silver, or something equivalent and convertible into the precious metals.
3. A protest for non-acceptance of a bill which recited that on a day before the maturity of the bill it was received by the notary, presented, protested, &c., and at the close recites, "This done and protested at Mobile, aforesaid"—Held sufficient as to the time of presentment.

ERROR to the Circuit Court of Tuscaloosa.

This was an action of assumpsit by the defendants in error as payees, against the plaintiff in error as drawer of a bill of exchange of the following tenor, for non acceptance :

"Tuscaloosa, February 12th, 1840.

\$1,176.

Eight months after date, please pay to the order of Holbrook, Bowman & Co. at the Bank of Mobile, one thousand one hundred and seventy-six dollars, in funds current in the city of New York, for value received, and charge the same to

Your ob't servant,

WM. M. LACY.

To Messrs. LACY, TERRELL & Co. *Mobile.*"

The declaration is in the usual form, describing the bill as having been drawn for *one thousand one hundred and seventy-six dollars, in funds current in the City of New York.*

The defendant pleaded non assumpsit, and a special plea, "That at the time of drawing the said bill of exchange, and from that time to the time of bringing this suit, the said defendant had funds to the amount of this bill in the hands of the drawees of said bill, and that if the said bill had been presented to any one of the partners of the said firm of Lacy, Terrell & Co. who knew the state of accounts between them and this defendant, the said bill would have been accepted."

Lacy v. Holbrook, Bowman & Co.

The plaintiff took issue on the first plea, and demurred to the second, which demurrer was sustained by the Court.

Pending the trial on the issue, as appears by a bill of exceptions, the plaintiff offered in evidence a protest, which recited that the bill was received by him on the 23d June, 1840, that he presented the bill to the agent of Lacy, Terrell & Co. and demanded acceptance, which was refused, and thereupon he protested the same, &c. "Notices of protest put in the post office this evening, directed to the drawer at Tuscaloosa, Ala. This done and protested at Mobile, in presence of, &c." To the introduction of this as evidence the defendant's counsel objected, but the Court overruled the objection and permitted it to go to the jury.

This being all the evidence, the defendant's counsel moved the Court to charge the jury that the bill of exchange and the protest were not sufficient to enable the plaintiff to recover, which charge the Court refused, and charged the jury that the evidence was sufficient; to which the defendant excepted.

The plaintiffs obtained judgment and the defendant prosecutes this writ and assigns for error—

1. The judgment of the Court on the demurrer to the plea.
2. The matters set out in the bill of exceptions.

MOODY, for plaintiff in error, cited 2d Starkie on Ev. 257; 8 Porter, 259; 1 Porter, 263; 1 Ala. Rep. 327; 2 ib. 565; 4 Mass. Rep. 252; Bank of Decatur v. Pierce, 3 Ala. Rep. 321.

PECK & CLARK, contra.

ORMOND, J.—The demurrer was properly sustained to the second plea. The interpretation put on it by the counsel for the plaintiff in error, that if the bill had been presented to any one of the partners, as they all knew the state of accounts between the parties, it would have been accepted, may have been the view of the pleader, but at least the plea admits of the construction that the bill would have been accepted if presented to one of the partners, who knew the state of the accounts. The established rule is to construe the plea most strongly against the pleader, and under the influence of this principle the demurrer was properly sustained.

Lacy v. Holbrook, Bowman & Co.

It is however insisted that the declaration is bad. The objection is founded on the description of the bill—that the terms “current funds of the city of New York,” do not mean money and therefore the bill is not negotiable. We do not think the objection can be sustained. The term “funds,” it is true, has a variety of meanings, in common with many other words in our language, and if it can be understood in some of the senses in which it may be used, it will be fatal to this instrument as a bill of exchange. When any word is used having more than one meaning the sense in which it is employed is to be gathered from the context—and we think it impossible for any one to doubt as to the intention of the parties in this case. The term *par funds*, or *New York funds*, is as well understood as the term *cash*, and it would be a reproach to the law if its ministers could not understand that which is obvious to all the rest of the world. As therefore by the terms “funds current in the city of New York,” the parties meant gold or silver, or some thing equivalent to it, and convertible at pleasure into the precious metals, they must abide by that construction here. If they intended that the instrument should be discharged by the certificates of stock constituting the *public funds*, or any thing else than the common circulating medium established by law, throughout the United States, they have been most unfortunate in the use of language.

The case of *Jones v. Falls*, [4 Mass. 252,] where it was held that an instrument payable in “foreign bills,” was not a bill of exchange, does not affect the question here. The Court considered that the import of the words *foreign bills* was not cash, but something differing in value from it. In this case we understand *New York current funds* to be cash, or at least something precisely equivalent to gold or silver.

This bill was drawn on the 12th February, 1840, at eight months. There was not therefore any obligation to present it for acceptance at all, though it might be presented for that purpose as late as the day before it fell due. It appears from the protest that it was presented on the 23d June, 1840. It is objected that it does not appear that it was so presented, or on what day it was presented. The notary states that he received it on the 23d June, 1840; he afterwards proceeds to state that he presented it for acceptance, which was refused, and

King v. McLoskey.

thereupon he protested it, &c., and concludes, "This done and protested at Mobile aforesaid, in presence of, &c." We understand this to refer to the recital at the commencement of the protest, of the time of the reception of the bill, but if it were a protest for non-payment it would be necessary that the precise time of the presentment should be stated, as it must be made on a day certain, ascertained by the bill.

The remaining objections are all well taken; they are, that the presentment was to "an agent," without stating to whom, and without proof of the agency, and that it was not proved that notice of the protest was sent to the proper post office.

The first objection is fully sustained by the cases cited from 1 Porter's Rep. 263, and 1 Ala. Rep. 327; and the last by the case of the Decatur Bank v. Pierce, 3 Ala. Rep. 321; and Foard v. Johnson, 2 Ala. Rep. 565.

For these errors the judgment must be reversed and the cause remanded.

KING v. McLOSKEY.

1. Where the plaintiff is twice nonsuited in the progress of the same suit, and the nonsuits are set aside by the Court, this does not affect his right to proceed to judgment. The act of 1807, [Digest 283, §135,] refers to nonsuits suffered in several actions for the same cause.

WRIT of Error to the Circuit Court of Shelby county.

Assumpsit by McLoskey & Co. against King as drawer of a bill of exchange.

The record shows that the plaintiffs suffered a nonsuit at three different terms, but each nonsuit was set aside at the term when suffered, and the cause continued. At a subsequent term the defendant pleaded two of these nonsuits in avoidance

King v. McLoskey.

of the action. This plea was overruled on demurrer, and judgment given for the plaintiff.

PECK, for the plaintiff in error, cited Digest, 283, §135; Bullock v Perry, 2 S. and P. 319,

CHILTON, contra.

GOLDTHWAITE. J.—The statute under which the defendant claims the right to interpose this plea, is in these terms :

“Every person desirous of suffering a nonsuit on trial, shall be barred therefrom, unless he do so before the jury retire from the bar ; and no more than two new trials shall be granted in the same cause ; and two nonsuits shall be considered as equal to a verdict against the party suffering the same.” [Digest, 283, §135.]

The object of this statute, most probably, was to prevent the institution of vexatious suits, and to provide a mode by which the defendant might have relief without applying to the Court of Chancery. There is nothing in the terms used that lead to the impression that it was intended to take from the Courts the power or discretion to set aside nonsuits. It will readily occur to any one acquainted with the Circuit practice, that the plaintiff often suffers a nonsuit in consequence of an erroneous charge by the Court, and if the construction of this statute is to be such as to prevent the Court from correcting its error by setting aside the nonsuit, much vexation, and frequently injustice would be the consequence.

Our opinion is that the statute refers alone to nonsuits which are decisive of the case, and on which the judgment of the Court is rendered. When the plaintiff has twice placed himself in this predicament, the nonsuits are equivalent to a verdict, but not otherwise.

Let the judgment be affirmed.

SMITH ET ALS. v. HOGAN.

1. Where writs of *feri facias* against the same defendant are at different times placed in the sheriff's hands, who *levied them simultaneously* on all the defendant's property in his reach, but did not sell under either, if the property is only sufficient to satisfy those, the lien of which had first attached, the sheriff is not liable to a judgment at the suit of a plaintiff in one of the junior *fi. fa's*, upon a suggestion that the money could have been made thereon by due diligence.

WRIT of Error to the Circuit Court of Coosa.

This was a proceeding by notice and suggestion under the statute against the sheriff of Coosa and his sureties, alledging that by due diligence the sheriff could have made the amount of an execution in his hands, at the suit of the defendant in error against Thomas W. and John Smith, for the sum of three thousand seven hundred and sixty-four 38-100 dollars, besides ten 12-100 dollars costs of suit.

The sheriff appeared and pleaded—1. He could not have made the money on the execution by due diligence. 2. That the plaintiff in execution, upon a notice being given him for that purpose failed to give him a bond to indemnify him for selling certain property under the execution. 3. That the land on which the execution in question was levied was not subject to the satisfaction of the same. 4. That the property levied on was not the estate of the defendant in execution. All of which are but equivalent to a denial of the suggestions.

On the trial the sheriff excepted to the ruling of the presiding Judge. It appears that the plaintiff offered to prove by the deposition of W. W. Bowdon, particular acts of the witness, relative to pointing out property, giving bond of indemnity, &c. without producing a letter of attorney, under which the witness acted, although it was admitted that the paper was in court, in the possession of the plaintiff's counsel; to this evidence the defendant objected, but his objection was overruled and it was read to the jury.

The plaintiff then proved that the bond "indemnifying the defendant for selling the goods levied on," &c. had that day been seen in his possession; under this showing the Court decided that the plaintiff might give parol evidence of the con-

tents of the paper, unless it was produced; thereupon the defendant produced the same.

The plaintiff then proposed to read the bond of indemnity to the jury, although its execution appeared to be attested by a subscribing witness, and one of the obligors executed it by attorney; to this the defendant objected, unless the bond was proved by the subscribing witness, and the authority of the attorney executing it was shown; but his objection was overruled and the paper read as evidence.

It was admitted that the title to the lands levied on by the plaintiff's execution, was in other persons, and never had been in the defendant in execution, yet the plaintiff, in despite of an objection by the defendant, was permitted to prove the value of a store house, mills and improvements situate thereon, of which defendant was in possession.

The defendant then gave in evidence sundry executions amounting to more than sufficient to cover the estimated value of the land and improvements thereon, founded on judgments of an anterior date to the plaintiff's execution, all against the same defendants. These executions were levied simultaneously with the plaintiff's, but the land had not been sold under any of the executions.

The Court charged the jury, that if they believed the defendant in execution had a possessory right, coupled with an equitable title to the lands and improvements at the time of the levy, that such possession and equitable right was subject to levy and sale by the sheriff.

The defendant prayed the Court to charge the jury, that if the defendant, as sheriff, had in his hands, at the time of levying plaintiff's execution, other executions of a prior lien against the same defendants, amounting to a sum sufficient to cover the proceeds of the sale of all the defendant's property, then the defendant was not liable to the plaintiff, although he did not sell any of the property levied on, or did not proceed further under the executions than to levy them. This charge was refused.

The jury returned a verdict as follows: "We, the jury, find that the sheriff, the defendant, could by due diligence have made the sum of eight hundred and eighty dollars and fifty cents, upon the said plaintiff's execution, in his said sugges-

tion mentioned." The plaintiff moved for a judgment for the amount of his execution, with ten per cent. damages thereon; this motion was overruled, and a judgment rendered for the amount found by the jury, against the sheriff and certain individuals described as his sureties, with ten per cent damages on the same, together with costs. Both the sheriff and his sureties have joined in the prosecution of a writ of error.

MORRIS, for the plaintiff in error. A recovery against a sheriff upon a suggestion, (if any thing,) must be for the full amount of the execution which he has failed to collect, and where it is not shown that the property of the defendant in execution was of value sufficient to satisfy it, the sheriff is not chargeable on motion. Where only a part of the money could have been made on the execution, the proceedings should be for a false return under the statute, in which, if the issue should be found for the plaintiff, the judgment would be for the amount of the execution, ten per cent. damages and costs. [Aik. Dig. Act of 1826, p. 174-5.] He might also resort to a common law remedy if he thought proper.

Plaintiff's counsel cited Bacon's Ab. Tit. Stat. 652, to show that if the meaning of a statute be doubtful, the consequences are to be considered in its construction; and that it should not be so interpreted as to be inconvenient or against reason.

The deposition of Bowdon was improperly admitted to show his acts without proof of his agency. He may have been a mere stranger, and the acts of such an one could not be allowed to charge the sheriff for want of due diligence. [May v. May, 1 Porter's Rep. 229.]

The bond of indemnity was produced without reasonable notice for that purpose—the sheriff claimed no interest under it, and in order to make it evidence its execution should have been proved.

If the defendant in execution had no title to the lands which he occupied, his possession of the houses situate thereon were not subject to sale. [Rhea, Conner & Co. 1 Ala. Rep. N. S. 219.] Much less was the equitable title subject to levy and sale by execution at law—our statute inhibits this, and declares a resort to equity to be necessary. So that if the possessory right might have been executed, the charge in respect to the

equitable title, not being authorized by any proof might have misled the jury and is objectionable on error.

Lastly, the fact of executions in the sheriff's hands of a lien prior to the plaintiff's, sufficient to exhaust the defendant's estate, is a sufficient answer to the suggestion, and show that so far as plaintiff is concerned, the want of diligence is not attributable to the sheriff. The case of *King v. Bell et al.* [8 Porter's Rep. 147,] is distinguishable from the present on this point; there no levies had been made, but here all the executions had been levied, a fact which secured the preference of those which first issued.

B. F. PORTER for the defendant, Bowden's deposition not being set out in the bill of exceptions, the court cannot adjudge its admission erroneous. [2 Stew. Rep. 38; 4 Monroe's Rep. 129; *ibid.* 273; 3 Rawle's Rep. 101.] The entire evidence should be set out when necessary to a correct decision, [1 J. J. Marsh. Rep. 504,] upon the principle that the party complaining must show error affirmatively. [1 Ala. Rep. N. S. 517; *ibid.* 582; Minor's Rep. 399; 1 Cranch's Rep. 318.]

The production of the bond of indemnity by the defendant below, relieved the plaintiff from the necessity of proving its execution, [8 Porter's Rep. 511,] and it may be questioned whether the time and manner of the notice is not so far a matter of discretion as not to be revisable on error

The letter of attorney to Bowdon was incidental only, and the authority might be proved notwithstanding its non production. [Anthon's N. P. 40; 4 Cranch's Rep. 398; 10 John. Rep. 443; 17 Mass. Rep. 160; 4 J. J. Marsh. Rep. 572; 11 Wend. Rep. 667.]

A possession coupled with a complete equity is liable to execution at law and bound by judgment. [1 John. Ch. Rep. 56-7; 16 John. Rep. 192; 18 *ibid.* 94; 3 Caine's Rep. 189; 9 Cow. Rep. 73.] This doctrine is not opposed by the case of *Rhea, Conner & Co. v. Hughes*, [1 Ala. Rep. 219.]

The prior liens of other executions is no defence to the suggestion. [*Bell v. King*, 8 Porter's Rep. 147.]

The seizure of personal property under execution amounts to a satisfaction *pro tanto*, unless it is defeated by the defendant himself. [9 Porter's Rep. 201; 1 Ala. Rep. N. S. 359.]

In a proceeding of this kind, the sureties of the sheriff need not be notified. [1 Ala. Rep. 207.]

COLLIER, C. J.—By a statute passed in 1820, it is enacted, “That the equitable title or claim to land, or other real estate, shall hereafter be liable to the payment of debts by suit in Chancery, and not otherwise; and when a bill shall be filed for that purpose, all persons concerned in interest, shall be made parties thereto.” It may well be questioned, whether the *mere possession* of real property can be sold under execution, where the defendant has an equitable title to the same. The act cited, if it does not expressly, would seem impliedly to inhibit such a proceeding. But we will forbear the expression of an opinion on this point, as there is another on which we may, perhaps, more satisfactorily rest our judgment.

Where goods are levied on by a *fieri facias*, the defendant may plead the taking in discharge of himself, and will not be liable to a second execution, unless they were removed by his connivance or permission, so that they could not be sold. [Webb v. Bumpass, 9 Porter’s Rep. 204.] This being the case, the mere levy of an execution places the property seized in the custody of the law, not subject to be taken by junior executions, so as to divest an operative levy, previously made. And if the older executions to which reference is made in the bill of exceptions, were levied simultaneously with the plaintiff’s, the latter could only come in after the former were satisfied. Now it is shown by the evidence set out in the record, that the entire property levied on was not of more than value sufficient to pay the older executions, and it necessarily follows that the plaintiff has no right to complain, that the sheriff could by due diligence have made the money on his execution. If neglect is attributable to the sheriff, there is nothing in the record to show that consequences prejudicial to the plaintiff resulted; if any one can complain, it must be the plaintiff in the executions which operated a prior lien.

It is insisted for the defendant in error, that the case of Bell et al v. King, [8 Porter’s Rep. 147,] is decisive of his right to recover. That was a proceeding by suggestion against the sheriff and his sureties similar to the present. The sheriff in his defence proved that at the time he received the plaintiff’s

execution, he had in his hands two executions against the same defendant, amounting in the aggregate to a sum equal to the value of all the property in the defendant's possession. This defence was disallowed by the primary Court; and this Court say that the "preference of an older over a younger execution creditor, does not excuse the sheriff from a levy of the latter, where the property is not needed to satisfy the former, as where the creditor waives his priority, or gives day, which, in the case before us, might possibly be inferred. But without resorting to any such inference, we think it clear that a return of *nulla bona* cannot be justified by the proof of a prior lien, unless the executions creating it were actually levied." This case is obviously unlike that now before us. There no levy was made on the defendant's property by the older executions, so that it did not appear that the plaintiff in them, had any thing more than a lien in law which might never be enforced; but in the case at bar the executions were regularly levied, a circumstance which the case cited impliedly asserts would relieve the sheriff from the imputation of neglect at the suit of the junior judgment creditor.

The levy of the elder executions designated the property which was to be appropriated to their satisfaction, unless they were paid by the defendant. And the mere omission of the sheriff to proceed to a sale, according to the directions of law, cannot make the property levied on liable to the payment of a junior execution, and thus defeat a lien which existed not only in law, but had attached in point of fact.

To apply these principles to the case at bar, if the elder executions were levied simultaneously with the plaintiff's, on property of not more than sufficient value to satisfy the former, the sheriff has been guilty of no neglect which can prejudice the plaintiff, and the charge prayed by the defendant should have been given to the jury. Other questions have been argued by counsel, and are presented by the record, but as the point considered will probably be decisive of the cause, in its ulterior progress, we will not notice any other. We have only to add, that the judgment of the Circuit Court is reversed and the cause remanded.

SMITH ET ALS. V. ZANER ET ALS.

1. When legal testimony is united with, and offered together with illegal testimony, as a whole, although the Court may do so, it is not bound to separate the good from the bad—but may reject the whole.
2. An alien may take land by the act of the parties, as by purchase or devise, and hold until office found; but he cannot take by act of law, as by descent, as he has no inheritable blood. An alien cannot, at common law, be heir to any one nor can he transmit inheritable blood to another.

ERROR to the Circuit Court of Tuscaloosa.

This was an action of trespass to try titles, brought in the Court below by the defendants against the plaintiffs. Under the charge of the Court the jury rendered a verdict in favor of the plaintiffs below, upon which judgment was rendered.

From a bill of exceptions taken pending the trial, it appears that the plaintiffs claimed to recover as the next of kin to Christopher Vanner, the person who died last seized, who were not aliens, being cousins of the full blood, that is children of the sister of the mother of Christopher Vanner.

After the plaintiffs had closed their testimony, the defendants proved that Christopher Vanner, the spring before he died, in the year —, requested one Kurtz, who was about to go to Germany, to make inquiry after his next of kin there—that he told Kurtz that he had a sister in Germany, that he had not heard from her in a long time, and gave to him, Kurtz, as a clue, what purported to be an old parish certificate of good character given to his mother when she left Germany, which certificate is in the German language.

Kurtz deposed, that when he arrived in Germany he wrote to the parish and several other towns in Germany, but heard nothing of the kin of Vanner until at length he received letters from a Mr. Malempre, who claimed to be a son of the sister of Christopher Vanner, but that he had never seen Malempre in Germany, nor could he say whether the letters were genuine or not. The defendants also offered to introduce certain

papers, (the originals of which are sent up with the record and will be hereafter described,) and offered by the witness, Kurtz, to translate them. And also proposed to prove by him, he professing to be acquainted with the subject, that by the laws of Germany no access was allowed to the original records, of which it was alledged these papers were transcripts, except by the keeper of such records, who has authority to make and certify extracts therefrom. The witness also stated that he had applied for and received the papers from such keeper of records, and that they were in the same state as when he received them—that their authenticity was certified in the manner required by the laws of Germany, and had the signature of the keeper of such records and the seal of his office—but the witness said he was not a civilian, or German lawyer; to the introduction of these papers the plaintiffs' counsel objected, and the objection was sustained by the Court, to which the defendants excepted.

The defendants then introduced Malempre, who deposed that his mother was dead, and had left in Germany, besides himself, several children—that he had an aunt, the sister of his mother still living in Germany—that he was thirty-five years of age, that his mother died when he was five years old—that he had heard his mother speak of the emigration of Christian Werner and some other relations to America, at an early date, and that his mother and aunt claimed to be the sisters of Christian Werner—that witness had never seen Christopher Vanner, and could only speak according to his belief as to the fact whether the said Christopher Vanner was his uncle or not. Evidence was also offered conducing to show that *Christian Werner* in German, and Christopher Vanner in this country were the same.

The defendants' counsel then moved the Court to charge the jury, that if they believed from the evidence that Christopher Vanner had a sister, and the children of a sister in Germany, that although they were aliens, the plaintiffs could not recover; which charge the Court refused, and charged that though they believed from the evidence that Christopher Vanner had a sister, and the children of a sister in Germany, who were aliens, that, being aliens, they could not take by descent. To which charge the defendants excepted.

Smith et als. v. Zaner et als.

The documents referred to in the bill of exceptions are in the Latin and German languages, consisting of, first, an extract from the *parochial* record of Bishopsheim of the marriage of the father and mother of Christopher Vanner, with the births of their children; second, an extract from the register of marriages and christening, of Wurtzburg, of the marriage of Franz de Malempre with Margaret Werner, the sister of Christian Werner, and the births of their children. Third, a certificate purporting to be made by the "Council of the overseers of the poor of the Royal County of Bishopsheim in the Kingdom of Bavaria," setting forth the good character of Elizabeth Eva Werner, sister of C. Werner. These documents are all signed by the persons who appear to have had the custody of the records, to which is attached their official seal.

To the first of these is appended the certificate of the Minister for Foreign Affairs of the Kingdom of Bavaria, with his seal of office, and the attestation of the Consul of the United States at Munich that his signature is genuine, to which is attached the Consular seal.

Fourth, two letters written by F. de Malempre, one to the defendant, Smith, and the other to Kurtz, in answer to inquiries made by him concerning the relations of Vanner in Germany—appended to these letters are translations.

The assignments of error bring to view the correctness of the refusal of the Court to permit the documents described in the bill of exceptions to be given in evidence, and the refusal to give the charge moved for by the defendants.

PORTER, CRABB & COCHRAN, for the plaintiff in error, contended, that this was not the case of a contest between an alien and the State, or with a purchaser and the ancestor, but was a question between the next of kin and an intruder. That as between these the question of alienage did not apply; the title was good against every one but the State. [3 Stew. 60; P. & M. Dig. 136.]

Upon the construction of the statute of descents of this State, they referred to 4th Kent's Com. 402-3-7-8.

That the defendants in error must derive their title through the mother of Vanner, who was an alien, and therefore had no inheritable blood. [Wilson v. Bartlett & Waring, 9 Porter,

266.] They maintained that the defendants in error took *per stirpes* and not *per capita*, [4th Kent's Com. 452,] and that the statute of this State had not changed the rule of the civil law.

They insisted that the law of Germany could be proved by parol, and not being objected to and shown to be in writing will be presumed not to be a written law. [6 Cranch, 274; 15 S. & R. 84; 2 Mil. Lou. R. 153.]

That a knowledge of foreign law is proved as a fact. [Cow. 174; 1 Cranch 28; 2 ib. 187.]

That the records of a foreign country may be proved by a copy, certified by the officer authorized by law. [2 Cranch, 187; 6 N. H. 567-70; 2 Caines, 155.] But that an inferior mode of authentication receivable. [2 Mun. 53; 3 Call. 446; 2 Wend. 411; 5 ib. 375, 387, 391; 7 Cow. 434; 8 Mass. 273.]

For the law in relation to proof of proceedings of Foreign courts, and by the certificate of a Bishop—as to questions of marriage and pedigree—and proof of the seal they referred to 2 Saun. on P. & E. 745; 1 Philips Ev. 239, 399; 3 East. 221; 1 Gilbert's Ev. 25; 2 Starkie's Ev. 703; N. Y. Dig. 886; L. 102, 104, 890; S. 167, 893; S. 185, 963; S. 977, 979, 965; S. 992, 966; S. 1005.

Upon the first point they also referred to 13 Wend. 546; 7 ib. 333, 367; P. & M. Dig. 65; 3 ib. 60; 7 John. 214.

PECK & CLARK, contra, maintained that when a person dies, leaving issue who are aliens, the latter are not deemed his heirs at law, but that the estate descends to the next of kin, who have inheritable blood, in the same manner as if no such alien issue were in existence. [4 Wheaton, 460; 3 Dess. 105; 7 Johnson, 214.] That whether the grandmother of the plaintiffs was an *alien* or not, was of no moment, as the record shows that they are the next of kin of the whole blood who are citizens. But they also insisted that this question was not presented on the record.

They admitted that pedigree might be proved by *examined* copies of parish registers, but not by *certified copies*. [4 Phil. Ev. C. & H. ed. 284.]

That when a foreign law is proved to be unwritten it may be proved by witnesses professionally conversant with it. [1

Smith et als. v. Zaner et als.

Phil. Ev. 401; 2 Cranch 236-7-8; Story's Con. of L. 529.] That no such offer was made in this case, and therefore the evidence was properly rejected.

ORMOND, J.—Two questions are presented on the record: The propriety of the rejection by the court of the documentary evidence offered by the plaintiffs in error, and the refusal of the Court to charge on their motion.

The documentary evidence rejected by the Court consists, first, of transcripts from what appears to be registers of births and marriages in Germany—one setting forth the marriage of the father and mother of C. Werner, the person last seized of the land in controversy, and the births of their children, and another the marriage of a sister of C. Werner, with a Mr. Mallempre, and the births of their children. These documents are in the Latin and German languages, are signed by the keeper of the records, with the seal of his office annexed, and certified to be true copies from the record. Appended to the first of these documents, is the certificate of the minister of Foreign Affairs of the Kingdom of Bavaria, with the seal of the State, and of the Consul of the United States at Munich, verifying the signature of the Minister of State, with the Consular seal attached thereto. And further offered to prove their contents by one Kurtz, who professed his ability to translate them—also, that he was acquainted with the subject, and that by the laws of Germany no access was allowed to the original records of which it was alledged these papers were transcripts, except by the keeper of such records, who has authority to make and certify extracts therefrom. Witness also stated that he had applied for and received the papers from the keeper of the records—that they were in the same state as when he received them, and that their authenticity was certified in the manner required by the laws of Germany, and had the signature of the keeper of such records and the seal of his office, but the witness admitted that he was not a civilian, or German lawyer.

Also, a certificate purporting to be made by the council of the overseers of the poor of the Royal county of Bishopsheim, in the Kingdom of Bavaria, setting forth the good character of Elizabeth Eva Werner, sister of C. Werner, with the seal of their office.

Lastly, two letters in the German language, to which are appended translations purporting to be written by Malempre, the brother-in-law of Vanner, the person last seized, (or Werner, as he is called in German, (one to the defendant Smith, relating to the claims of the heirs of Vanner in Germany to the land in dispute, setting forth the nature of that relationship and urging him to preserve the property for the heirs. The other written by the same person to the witness, Kurtz, who had been requested by Vanner to make inquiry in Germany about his (Vanner's) relations, and embracing the same topics as the letter to Smith.

In most, if not all, civilized countries, some mode is provided by law for perpetuating the evidence of marriages. Such appears to be the case in Germany. It is however objected that, conceding such to be the fact, the proof can only be made by showing that the evidence offered was an examined copy of the record. Such is doubtless the law in England, under the influence of the rule of evidence that the best evidence in the power of the party to obtain must be adduced.—Conceding the law of Germany to be as stated by the witness, we should hesitate long before we decided that the two first mentioned papers were not evidence. To require any thing further would be, in effect, to require an impossibility, and the necessity therefore exists of submitting to inferior proof of the fact, if, indeed, the proof offered can be considered as inferior to proof by an examined copy. In the case of *Church v. Hubbert*, [2 Cranch, 187,] C. J. Marshall says, “it is very truly stated that to require respecting laws or other transactions in foreign countries that species of testimony which their institutions and usages do not admit of, would be unjust and unreasonable. The Court will never require such testimony. In this, as in all other cases, no testimony is required which is unattainable.”

The proposition to introduce this testimony is thus stated in the bill of exceptions: “The defendants then offered to introduce as evidence certain papers which are hereto attached and made part of this bill of exceptions, and identified by mark No. 2, thereon, and offered a witness to translate them,” &c. The originals are now before us, united by being stitched together, with the mark designating them on the back.

We cannot understand from the terms in which this proposition is conceived, that each piece of testimony was offered separately. The plain and natural import of the terms, how strange soever it may seem, are that it was offered as a whole, and if the language admitted of doubt, it would be set at rest by the appearance of the papers now before us.

Considering therefore, as we must, that this mass of documents were offered collectively, and as a whole, if any portion of them was incompetent or irrelevant, the Court, though it might have done so, was not bound to separate the good from the bad, but could only be required to respond to the motion as made, and approve or reject it. [Moore v. Leftwick, 1 S. and P. 254 ; Elliott v. Pearsol, 1 Peters, 328.]

No proposition relating to the law of evidence can well be clearer than that the letters, and certificate of good character of Elizabeth Werner, were not competent testimony in this action for any purpose. They are the mere unauthorized declarations of third persons, not made under the sanction of an oath, and without any opportunity being afforded to the party to be affected by them to cross examine ; in a word they are mere hearsay.

If therefore, it be conceded, as we incline to think it must be, without attaching any weight whatever to the certificate of the Minister for Foreign Affairs, or the Consul of the United States, that the two first described documents were legal testimony, yet being united with, and offered together with, illegal testimony, the decision of the Court rejecting the whole must be sustained.

The question arising under the charge of the Court involves the consideration of the question of the right of an alien to inherit lands in this State.

The only statement of the title of the plaintiffs below is, "that they claimed to recover as the nearest of kin to Christopher Vanner, the person who died last seized, who were not aliens, being cousins of the full blood—that is, children of the sister of the mother of Christopher Vanner."

The defence shown by the record was that the plaintiffs could not recover, because there was in existence a sister and the children of a sister of Vanner, in Germany, although they

were aliens. And to this effect the Court was asked to charge the jury, and refused.

The statute of descents of this State, so far as it is necessary to the elucidation of this question is, "Where there shall be no children, or descendants of them or any of them, then to the father, if he is living, if not to the mother of the intestate; and if there be no children of the intestate, or descendants of such children, and no brothers or sisters, or descendants of them, nor father or mother, then such estate shall descend in equal parts to the next of kin to the intestate, in equal degree, computing by the rules of the civil law, and there shall be no representation among collaterals, except with the descendants of the brothers and sisters of the intestate," &c. [Aik. Dig. 128.]

Waiving, for the present, the inquiry relating to the plaintiffs' title, what obstacle to their recovery was presented by showing that a sister and descendants of a sister of the person last seized existed in Germany, it being also shown that they were aliens?

An alien, it is true, may take lands by the act of the parties, as by devise or purchase, and may hold until the State thinks proper to interpose, and cause the lands to escheat by an *inquest of office*; but he cannot take by the act of the law, as by descent, as he has no inheritable blood. An alien, as it relates to land, cannot at common law be heir to any one, nor can he transmit inheritable blood to another. [1 Bac. Ab. Alien C. 130; 1 Thomas' Coke, 100; 2 B. Com. 249; 7th Wendell, 368; 4 Wheaton, 453.]

Such being the law, the fact that the deceased had relations living in Germany, who were nearer of kin to him than the plaintiffs below, and therefore preferred by the statute, but who were *aliens*, would oppose no obstacle to their recovery, because such aliens, though nearer in blood, are not heirs. In the language of Judge Story, in *Orr v. Hodgson*, [4 Wheaton, 461,] "Where a person dies, leaving issue who are aliens, the latter are not deemed his heirs in law, for they have no inheritable blood, and the estate descends to the next of kin who have an inheritable blood, in the same manner as if no such alien issue were in existence." The Court therefore did not err in refusing the charge asked for.

It was however strenuously argued by the counsel for the

plaintiffs in error, that the plaintiffs below have no inheritable blood, and therefore not entitled to recover in this action. The argument is, that the descent from the deceased to them is not immediate, as in the case of brothers and sisters, but must be derived from the common ancestors, the maternal grandfather and grandmother, both of the plaintiffs and the deceased, who it is insisted were aliens, and therefore incapable of transmitting inheritable blood, so as to enable the defendants in error to take by descent from the deceased, and such it is said is the effect of the decision of this Court in *Bartlett and Waring v. Morris*, [9 Porter, 266.]

The concession that the law is as stated will not avail the plaintiffs in error any thing.

It is certainly true that the plaintiffs must recover by the strength of their own title, and not on the weakness of that of their adversaries, but we do not learn from the record that this question was mooted in the Court below, nor is there any evidence to be found in the record, rejected or admitted, which shows that either the mother of the plaintiffs below, or her grand parents were aliens. We may indeed conjecture that as all the rest of the family appear to have been Germans they were also. All that we know with certainty on the subject is, that "they (the plaintiffs below,) claimed to be the nearest of kin to the person last seized who were not aliens." Whether this *claim* was well or ill founded, is not one of the questions reserved for our decision, and so far as we are instructed from the bill of exceptions, must have been either waived or admitted by the plaintiffs in error.

The charge the Court gave for some reason which does not appear, is not given in the bill of exceptions. The defendants then asked the Court further to charge, not that the plaintiffs had no inheritable blood, and therefore could not recover, but that because the deceased had a sister and the children of a sister in Germany, although they were aliens, the plaintiffs could not recover. In refusing this charge the Court did not err.

It is the precise and appropriate function of this Court, to determine the questions of law presented on the record, and no other; and as no error is shown to exist in the judgment of the Court below, it must be affirmed.

THOMAS & TROTT v. ELLIS & Co.

1. Where the plaintiff declares on a special contract for building a house, and also on the common counts, for work and labor, a recovery may be had on the latter without proving a special contract subsequent to and distinct from that declared on. The rule is, that a recovery may be had for work and labor, whenever the defendant has accepted the work, although it may not amount to a performance of the special contract.

WRIT of Error to the Circuit Court of Sumter county.

Ellis & Co. commenced this suit in the County Court of Sumter, and declared against Trott & Thomas in an action of *assumpsit*. The declaration contained a count on a special contract, made by the plaintiffs with the defendants, to build a house in a particular manner, and for which they were to receive certain specified sums from the defendants. The breach of this count is laid in the non-payment of the sums agreed upon. The declaration also contains counts for money due for work and labor, and on a *quantum meruit*.

A verdict was found for the defendants on the general issue.

In the record there are two bills of exceptions, both sealed by the presiding Judge, who adds to the last an explanation of his reasons for signing it. The first of these bills discloses that the jury was instructed that the written contract of the parties must be complied with; and if they believed from the testimony that Thomas & Trott, the defendants, had received the house under the written agreement, this was sufficient, and they were bound to pay for it; but if the parties, subsequently to the written agreement, had made a different special contract, then they were bound to find for the plaintiffs on the common counts for work and labor, &c. But they could not find on such written agreement and common counts both.

The second bill states the charge to have been, that unless the plaintiffs had proved a special contract between themselves and the defendants, subsequent to, and distinct from, that declared on, they had no right to find for the plaintiffs on either

of the common counts; and that the plaintiffs could not recover on both.

The plaintiffs excepted, and a verdict was returned for the defendants, on which judgment was rendered. A writ of error from the Circuit Court was sued out, and the judgment of the County Court was there reversed for errors in the charges to the jury.

From this judgment the defendants prosecute their writ of error, and here assign that the Circuit Court erred in reversing the judgment of the County Court.

SMITH, for the plaintiffs in error.

HAIR, contra.

GOLDTHWAITE, J.—The evidence which was before the jury when these charges were given, is not stated, and therefore it is doubtful whether any injurious results flowed from them; but the charges are entirely affirmative, and therefore the rule laid down in *Peden v. Moore*, [1 S. and P. 71,] where it was held that injury would be presumed when error was shown in such a charge, although the evidence was not stated in a bill of exceptions, must govern. If we understand the position assumed by the County Court, the instructions to the jury were, that the plaintiffs could not recover on the common counts of the declaration, unless they proved a special contract, subsequent to, and distinct from, that declared on in the first count. This we think is not a correct exposition of the law applicable to such a case as this most probably was upon the evidence. If it was shown that the special contract was not substantially performed, no recovery could be had on the first count, as its performance is there asserted, and it is upon this performance that the plaintiffs predicate their right of action: but the proof failing in this respect, it does not follow that they must be precluded from a recovery under the common counts.

Indeed, nothing is more common than to permit a recovery upon an implied contract to pay the value of the labor, although it may not have amounted to a performance of the special contract; and this is always the rule when the defendant has accepted the work, or entered into possession and use of the

Douthitt v. Hudson & Brockman.

house actually erected. [Haywood v. Leonard, 7 Pick. 181; Thornton v. Place, 1 M. and Robinson, 218; 2 Stark. Ev. 97, n. 1.]

The authorities just cited, show that a recovery can be had on the common counts, although the special contract has never been performed.

The charge of the County Court was therefore erroneous, and the judgment of the Circuit Court reversing it must be affirmed.

DOUTHITT v. HUDSON & BROCKMAN.

1. The assignment of a note by the payee, in these words, "For value received I indorse the within note to H. & B. and warrant the payment of the same," does not impose an absolute and unconditional liability, but is a promise to pay to the assignee if the maker is unable to do so.

WRIT of Error to the Circuit Court of Benton.

This was a suit brought by the defendants in error against the plaintiff before a Justice of the Peace, and a judgment being rendered in their favor, the cause was removed by certiorari to the Circuit Court.

The statement filed by the plaintiffs in the Circuit Court alleged that H. P. Douthitt was indebted to them as the indorser of a note made by J. B. Palier, on the 9th of March, 1840, and payable on the 1st October thereafter, for forty-seven 50-100: *And further*, that the plaintiffs became the proprietors of the note on the 20th April, 1840, and recovered a judgment against the maker, on which an execution has been issued, and returned "no property found," according to the statute.

On the trial a bill of exceptions was sealed, at the instance of the defendant, which sets out his indorsement as follows:

"For value received I indorse the within note to Hudson &

Douthitt v. Hudson & Brockman.

Brockman, and warrant the payment of the same. April 20th, 1840. H. P. DOUTHITT."

On the 16th of October, 1840, the plaintiffs caused an attachment to be issued against the estate of Palier, which, on the 19th of that month, was levied on a negro boy, as the property of the defendant in attachment. On the 10th December, an order was issued by the Justice of the Peace before whom the proceedings were had, requiring the Constable to sell the slave levied on, who returned thereupon that he was not liable to be sold under the order. To all which evidence the defendant objected, but his objection was overruled and it was permitted to go to the jury.

The defendant's counsel then moved the Court to charge the jury, that the plaintiffs were not entitled to recover upon the evidence adduced; which charge was refused. Thereupon the Court instructed the jury, that to authorize the plaintiffs to recover of the defendant, the terms of his indorsement were such as not to make it necessary to sue the maker of the note, but the liability incurred by it was absolute and unconditional.

T. A. WALKER, for the plaintiff in error.

WM. COCHRAN, for the defendants.

COLLIER, C. J.—If the pleadings in cases removed by appeal or certiorari from the judgments of Justices of the Peace to the County or Circuit Court, were to be scanned by the general rules of pleading, we are inclined to think that the allegations of the statement were not appropriate to the evidence adduced. But the view which we take of this case, relieves us from considering this point.

The question we propose to examine is, did the Court in its charge to the jury correctly lay down the law? In *Grannis & Co. v. Miller & Wilkins*, [1 Ala. Rep. 471,] the defendants were sued on an indorsement in the following words: "For value received, we assign and guarantee the payment of this note to C. B. Grannis & Co. waiving demand and notice. March 10th, 1838."

The Court held that the assignment could not be regarded merely as the transfer of the legal title to the note, and the liability of the assignors depend upon the performance of the sta-

Wright v. Lyle.

tutary condition; but that the guaranty of payment created a promise to pay the amount of the note to the assignees, if the maker was unable to do so.

In the case at bar, the term "warrant" is of equivalent import with *guaranty*, and the contract in question is a transfer of the legal title to the note, and a guaranty that the maker is able to pay.

The plaintiff in error, then, was not bound to pay the note at all events; and in so stating the law to the jury, the Circuit Judge erred, and the judgment is consequently reversed and the cause remanded.

WRIGHT v. LYLE.

1. By going to trial in an action of forcible entry and detainer without objection to the regularity of the process, the return of the Sheriff, and the form of the complaint, all objections thereto are waived and cannot be made on error.
2. The Justice of the Peace may grant a new trial in a case of forcible entry and detainer.
3. A possession peaceably acquired will be converted into a forcible and unlawful detainer by a refusal to yield the premises on demand, and forcibly retaining it. Nor is it necessary that a demand to quit should be in writing, unless there was a previous tenancy, under which the possession was first acquired.
4. The description of the land in the complaint must convey a distinct or definite idea of the land sought to be recovered; but if no objection is taken to it in the Court below, it will be aided by the verdict and judgment if they identify the lands with reasonable certainty.

ERROR to the Circuit Court of De Kalb.

This was a proceeding commenced originally by the defendant against the plaintiff in error, before a Justice of the Peace for a forcible detainer.

The complainant states "that he was in possession of a certain messuage and parcel of land, with the appurtenances, containing thirty acres, be the same more or less, adjoining Thomas

Wright v. Lyle.

B. Watts and others in the said county of De Kalb, until James C. Wright, on, &c., unlawfully entered thereupon and forcibly and unlawfully detains and keeps possession of said land and appurtenances, &c. &c.”

- The jury found a verdict for the defendant, and the Court granted a new trial.

At a subsequent time a trial was had, and the complainant offered in evidence a sealed instrument executed by the defendant, by which he leased for one hundred years a piece of land, which is described as “the tract of land on which I now live, in De Kalb county, which joins the lands of T. B. Watts and Lemuel Payne and James Lyle, and to which land I am entitled to a pre-emption under the late act of Congress, and which said land is to be used, occupied and enjoyed by the said James Lyle for the space of one hundred years; and I do further bind myself to keep the said Lyle in peaceable possession of said land,” &c. To which testimony the counsel for the defendant *demurred*, but the *demurrer* was overruled by the Court.

The defendant’s counsel then moved the Court to charge the jury—

1st—That as there was no proof to show that the defendant was a tenant of the complainant, nor in possession of the premises by collusion with any tenant of the complainant, nor any proof of a written notice to the defendant to quit the premises of complainant, they could not find the defendant guilty of an unlawful detainer.

2d. That as there was no proof introduced to shew that the defendant had manifested any force in word or action, they could not find the defendant guilty of a forcible entry or detainer, or of a forcible detainer—which charges the Court refused to give, and the jury found a verdict for the complainant, upon which the Court rendered judgment.

The cause was carried by *certiorari* to the Circuit Court and the following errors assigned:

1. The description of the premises is insufficient.
2. The Justice erred in granting a new trial.
3. The process was improperly directed.
4. The complaint was for a forcible and unlawful detainer, and the writ issued for a forcible entry and unlawful detainer.
5. There was no return indorsed on the writ.

Wright v. Lyle.

6. In overruling the demurrer to the lease, there being no other proof of possession.

7. In refusing to give the charges requested.

The Circuit Court affirmed the judgment of the Justice of the Peace, from which this writ is prosecuted.

PECK & CLARK, for plaintiff in error, submitted the cause without argument.

ORMOND, J.—The third, fourth and fifth assignments of error, which question the regularity of the process, the return of the sheriff and the form of the complaint, if well taken cannot now be considered. By going to trial without objection, all these defects if they exist, were waived, and cannot now be urged.

It cannot admit of question that the magistrate has power to grant a new trial in a case of forcible entry and detainer. The power to enter judgment upon the verdict of a jury supposes the right to consider whether the verdict is supported by the testimony. Many other cases might be supposed which would render it improper to render judgment, and which could only be redressed by granting a new trial; but we consider the point too clear to require elucidation.

The evidence to which it is stated the defendant *demurred*, was a lease executed by him to the plaintiff for the premises in controversy. This was certainly competent testimony to shew the right of the plaintiff to the possession of the premises which the complaint alledges he had, and which we must presume was proved. By the term *demurred* is probably meant that the defendant objected to its introduction as evidence; be the objection however what it might, it was properly overruled.

The charges asked for, suppose that there can be no unlawful detainer except where a tenancy exists, or where the defendant is in collusion with or holding under a tenant. The third section of the act regulating this proceeding, [Aik. Dig. 203,] declares that where an entry has been peaceable, and afterwards kept by strong hand, it will be a forcible detainer. What the evidence was in this case, we are not informed, as it is not set out in the record, but the complaint states that

Wright v. Lyle.

the plaintiff was in possession of the premises, &c. and that "the defendant unlawfully entered thereon, and forcibly and unlawfully keeps and detains the possession of the said land." If, therefore, the defendant obtained peaceable possession of the premises, his refusal to yield the possession on demand, and forcibly retaining it, would be a forcible detainer. Nor was it necessary in such a case, that any demand to quit should be made in writing, that is only necessary where there was a previous tenancy, under which the possession was first acquired, which is not the case here.

The first assignment of error, that the premises are not sufficiently described, must be sustained. The description in the complaint of the premises, the possession of which is sought to be recovered, is "a certain messuage and parcel of land, containing thirty acres, be the same more or less, adjoining Thomas B. Watts and others, in the county of De Kalb." In the case of *Sturdevant v. Murrell*, [8 Porter, 322,] we held, "that in the action of trespass to try title, the declaration should describe the land in controversy with so much particularity and precision as will inform the defendant what he is to defend against, and the Court for what it is called on to render judgment."

We can perceive no reason why the same rule should not apply to the action of forcible entry and detainer, and in this case, as in that cited, the description is altogether vague and uncertain, and conveys no distinct or definite idea of the land sought to be recovered; but as no objection was made in the Court below to the complaint, none would be allowed here, if the verdict and judgment contained such a description as would identify the land recovered with reasonable certainty, and enable the sheriff to put the party in possession, without danger of trespassing on the rights of others, as was held in the case just cited.

The verdict of the jury merely finds the defendant guilty, "in manner and form as complained of," and the judgment of the court is that the "plaintiff recover of defendant possession of his place." The defective complaint is not therefore aided by the verdict or judgment, and for this error the judgment is reversed.

MAYNARD & Co. v. JOHNSON.

1. It is the duty of a Court, when a proper charge is requested, to respond directly to the charge asked for, and the refusal to give an appropriate charge cannot be justified by afterwards giving one less extensive, but equally free from error.
2. The taking of a promissory note raises the presumption that a settlement is then made of all outstanding accounts between the parties, but this is a presumption which may be rebutted by other presumptions, or by other facts and circumstances.

WRIT of Error to the Circuit Court of Mobile county.

Action of assumpsit on the common counts by Johnson against Maynard & Co. Pleas—non-assumpsit, payment and set-off.

At the trial the plaintiff offered in evidence letters written by the defendants, conducing to show the course of dealing between them, and that in the year 1838, the plaintiff sold to the defendants a stock of drugs, for about two thousand dollars. Also an account rendered by the defendants to the plaintiff, under date of August, 1838, showing a balance against the defendants of 422 50-100 dollars. The defendants offered in evidence a note made by the plaintiff to them or bearer, under date of the 10th May, 1840, promising to pay 45 40-100 dollars on the first day of January then next.

The defendants asked the Court to charge the jury, that the giving of a promissory note by the plaintiff to them, after the date of the account, on which the defendants admitted themselves indebted to the plaintiff, was, if unexplained, presumptive proof of a settlement of accounts between them.

And the defendants asked the further charge, that the giving such promissory note by the plaintiff to the defendants was sufficient to warrant the jury in finding the plaintiff indebted to the defendants; and that if such fact be unexplained, the jury ought to find a verdict for the defendants, for the principal and interest of the note. These charges were refused, and the jury instructed they must take the whole case, and find such a

verdict as the proof on both sides warranted ; that the note was not conclusive evidence of a final settlement.

The defendants excepted to the refusal to give the charges asked for, and also to that given, and prosecute this writ of error to reverse the judgment rendered against them.

STEWART, for the plaintiff in error.

DARGAN, contra.

GOLDTHWAITE, J.—1. We have several times held that it is the duty of a Court, when a proper charge is requested, to respond directly to the request ; and that the refusal to give an appropriate charge will not be justified by afterwards giving one equally free from error. In the present case the defendants requested the Court to instruct the jury, that the giving of the note by the plaintiff, to the defendants, created the presumption of a settlement of accounts up to the date of the note, and that this presumption, if unexplained, was evidence of such a settlement. We think the Court should have given this charge, as it is strictly proper, under the facts disclosed in evidence.

2. After giving the charge as requested, it would have been proper to explain to the jury that the giving the note raised the presumption of settlement of all outstanding accounts between the parties ; but that this was a presumption which could properly be rebutted by other facts and circumstances. The charge given in this case was less extensive than the one which the defendants asked for, and waived the question of any presumption arising out of the giving of the note by stating to the jury that it was not conclusive.

It is not important to consider the refusal to give the other charge requested, as the conclusion that there is error is already attained.

Let the judgment be reversed and the cause remanded.

GRANBERRY v. WELLBORN, USE, &c.

1. When, in an action of *assumpsit*, the common counts are added to a count on a promissory note, it is allowable to take a judgment by default, without causing a *nolle prosequi* to be entered as to the former; but the judgment in such case must not exceed the amount of the note.
2. When a writ issues against two and is returned executed upon one, but is silent as to the other, the legal conclusion is that the latter was not served; under such circumstances it is allowable to take a judgment against the party only who is before the Court, and discontinue as to the other.
3. The writ issued in the name of the nominal plaintiff for the use of J. P. H. and in the declaration E. H. was made the beneficial plaintiff: Held—that the party for whose use the suit was brought being made liable for costs by statute, it was irregular to substitute for his, another name in the declaration, in his stead; and that the objection was available after judgment by default.

WRIT of Error to the Circuit Court of Barbour.

This was an action of *assumpsit* on a promissory note, brought by the defendant in error. The writ was issued against Granberry and Wm. B. Deloach, as makers of the note, requiring them to answer the plaintiff, for the use of John P. Huntingdon, and was served on the defendant only. No return was made as to Deloach. The declaration is in the plaintiff's name, for the use of Elliott Huntingdon, and contains the common counts in addition to a count on the note, against the defendant only, discontinuing the action as to Deloach, on whom it states process was not served. For the same cause there is a discontinuance of the suit as to Deloach in the judgment, which is rendered by default against the defendant.

PECK & CLARK, for the plaintiff in error, contended, that as the declaration, in addition to a count upon the note, contained the common counts, and a final judgment by default, it was erroneous. The writ not being returned "not found," as to Deloach, the discontinuance was irregular, and put an end to the suit. *Lastly*, the declaration was unauthorized by the writ, being in the name of the plaintiff, for the use of Elliott Huntingdon, instead of John P. Huntingdon. The plaintiff's counsel cited *Graves v. Lake*, at this term.

CRAWFORD, for the defendant. The errors insisted on, even if irregularities, are too trivial to be noticed on error. It was not, according to the decisions here, necessary to *non pros.* the common counts before taking a judgment by default on the count upon the note. And the Court will not look behind the declaration, and reverse for an error apparent upon the writ.

COLLIER, C. J.—It has been repeatedly holden, that where the common counts in *assumpsit* are added to a count on a note, that the plaintiff may take a final judgment by default, although no particular disposition is made of the common counts. The amount of the recovery, however, should not exceed the sum expressed in the note with interest. [Graves v. Lake, at this term, and cases there cited.] It is objected that in the present case, the judgment falls short of the note, five hundred dollars, and it cannot be intended that it is for the money thereby promised to be paid. This argument is not defensible. The reasonable inference is, that the note had been reduced by payments; and this is authorized by the principle which requires that all fair presumptions shall be made on error, in favor of the judgments of inferior Courts.

2. The second section of the act of 1818, enacts, "Whenever a writ shall issue against any two or more joint, or joint and several obligors, covenanters or drawers, of any such bond, covenant, bill or promissory note, or against two or more of the defendants to any such joint judgment, it shall be lawful for the plaintiff or his attorney, at any time after the return of said writ, or an *alias* writ, to discontinue such action against any one or more of the defendants, on whom such writ, or *alias* writ, shall not have been executed, and proceed to judgment against any one or more of said defendants on whom said writ shall have been executed, or proceed to issue an *alias* or *pluries* writ, at his election. This statute does not make the return of *non est inventus* the only evidence of the non-execution of the process; and where the return affirms its execution on one of two defendants, but is silent as to the other, the legal conclusion is, that there was no service on the latter. Under such circumstances a discontinuance is authorized by the act cited. [Aik. Dig. 267.]

3. In *Teer v. Sandford & Cleaveland*, [1 Ala. Rep. 525,] it appears that a writ issued at the suit of the plaintiffs for the use of another. The declaration states that the plaintiffs, "who in the writ are said, by mistake, to sue for the use of John H. Ezell, now for their own proper use and benefit sue," &c. This Court say, "the mistake of inserting the name of a *cestui que use* is as much beyond the reach of amendment as a mistake in the name of any other party. Under our statute the *cestui que use* is liable for costs, [Aik. Dig. 262, §22;] therefore, if for no other reason, the defendant had an interest in preventing it, and might be affected by a change of parties." There the variance between the writ and the declaration appeared on the face of the declaration, and was taken advantage of by demurrer; here the substitution of one beneficial plaintiff for another is shown by a reference to the writ. Ordinarily, a variance between the writ and declaration can only be reached by plea in abatement, but the rule is not of universal application. Thus in *Elliott v. Smith & Co.* use, &c. [1 Ala. Rep. 74,] the writ issued in the name of Smith & Co. for the use of Harralson, and the declaration was in the name of Harralson; no objection was made in the Circuit Court to the irregularity, but a final judgment by default was rendered, yet this Court reversed the judgment on the ground that the declaration was a nullity. So in *Randolph v. Cook & Ellis*, [2 Por. Rep. 286,] a judgment by default was rendered for want of a plea, even after an appearance had been entered. On error this Court referred to the writ to ascertain whether the suit was not prematurely brought, and on that ground reversed the judgment of the County Court. To these citations others similar in principle might be adduced, but these are deemed quite sufficient to show, that in cases analagous to the one before us, this Court will look to the writ, to ascertain if the error complained of does exist. In this view of the case, *Teer v. Sandford and Cleaveland* is decisive of the point, and the consequence is, the judgment of the Circuit Court is reversed and the cause remanded.

TAYLOR AND WIFE ET ALS. V. REESE, ADM'R.

1. The Commissioners have no power to ascertain the value of property brought into *hotch pot*; such value must be ascertained by the Judge of the County Court, or by a jury under his directions.
2. A return made by the Commissioners, received by the Court, and ordered to be recorded, will be presumed to be correct until the contrary is shewn.
3. A child who has been advanced by the parent in his lifetime, refusing to bring such advancement into *hotch pot*, thereby relinquishes all his interest as distributee of the estate.
4. An administrator wishing to make final settlement should present his accounts to the Judge of the County Court, whose duty it is to audit and state them, and report them for allowance at a succeeding term, at least forty days notice being given.
5. Minors should have guardians appointed to protect their interests at the settlement.

Error to the Orphans' Court of Lowndes.

On final settlement and distribution of the estate of Edward Lassiter, deceased, by the defendant in error as administrator.

The defendant made known to the Court that the estate of his decedent was not indebted so as to prevent a division of the negro property among the widow and heirs, who are described, four of the latter being minors. Thereupon the Court appointed Commissioners to divide the slaves in the following manner:

There being more than four children, and the widow being entitled to a fifth part, the Commissioners are directed to divide the slaves into five equal parts, as near as can be, including the amount or value of such property, as may have been given off to any of the heirs, by the decedent in his lifetime, the value to be ascertained by what it was worth at the time of delivery, which value is to be added to the amount or value of the negroes now on hand. One fifth part of which is by lot to be awarded to the widow.

The Commissioners will then throw the remaining four shares into one common stock and divide the same into six equal shares, as near as may be, adding in the negroes or their value

Taylor and Wife et als v. Reese, Adm'r.

given to any of the children in the decedent's life time, and ascertain by lot to which each share belongs.

Any heir who may refuse to bring the negroes advanced to him by the decedent into hotch pot, his interest in the division to be dropped, and the slaves to be divided among the residue.

The Commissioners proceeded to make division of the slaves among the widow and heirs, and returned the same to the Court, which ordered it to be recorded. The share allotted to the widow is thus stated:

Now at this Court, the Commissioners appointed by this Court, to make division of the negro property of the estate of Edward Lassiter, between the several heirs at law of the deceased, came into Court and returned the lot drawn by Clarissa Lassiter, whereupon it is ordered by the Court, that the Clerk enter upon record in his inventory book said lot, drawn by Clarissa Lassiter.

At the September term, 1841, of the Court, the administrator applied for a final settlement of the estate, whereupon the Court set apart the first Monday in November after, and directed publication to be made.

At the November term the administrator produced his accounts for final settlement, which were ordered to be recorded, and thereupon the Court proceeded to make a final settlement of the estate, ascertaining the amount in the hands of the administrator subject to distribution, and decreeing the respective shares to each of the heirs, none appearing to be decreed to the widow. It does not appear that the heirs were present or that the minors were represented by their guardians.

From this judgment the heirs presecute this writ, and assign for error—

1. The Court erred in authorizing the Commissioners to ascertain the value of the slaves brought into hotch pot, and in disinheriting such of the heirs as would not bring their advancement into hotch pot.

2. It does not appear that the widow had one fifth part allotted to her.

3. The administrator did not file his accounts previous to final settlement.

Taylor and Wife et als v. Reese, Adm'r.

4. The Court erred in receiving the accounts of the administrator on the day appointed for final settlement.

5. No notice was given of final settlement after accounts filed.

6. The minors were not represented at the final settlement.

7. No share was set apart for the widow at the final settlement.

8. The administrator was not entitled to his discharge.

Cook, for the plaintiff in error, cited 4th Porter, 332; 7 ib. 270; 8 ib. 507.

ORMOND, J.—In the case of Teat v. Lee, [8 Porter, 507,) this Court held that Commissioners appointed by the Orphans' Court to make division of property, had no power to ascertain the value of property brought into *hotch pot*, but that the value must be ascertained by the Judge of the County Court himself, or by a jury empannelled by him for that purpose. In this case the value of the property appears to have been ascertained by the Commissioners, by direction of the County Court. No other construction can be put upon the order of the County Court, as it is evident that the value of the property was not ascertained when the order was made, and the ascertainment of such value was a prerequisite to the division.

A child having received from the parent an estate by way of advancement, may refuse to bring such advancement into *hotch pot*, but the result of such refusal must be that the child relinquishes all share or interest in the estate of his parent as a distributee of the estate. This results from the reason of the thing, and is the evident meaning of the 15th section of the act on this subject. [Aik. Dig. 155.]

The objection that it does not appear that the one-fifth part of the slaves was allotted to the widow cannot be sustained. The record shows that the lot drawn by the widow was returned into Court, received by it, and ordered to be recorded. If less than one-fifth part, as the order of the Court directed, was allotted to her, objection should have been made and the facts spread upon the record, to enable this Court to determine the fact.

The remaining assignments of error relate to the final settlement of the administrator.

When an executor or administrator desires to make final settlement, he should present his accounts to the Judge of the County Court, whose duty it is to *audit and state them*, and report them for allowance at a succeeding term of the Orphans' Court, of which at least forty days notice must be given. The object of the law is, that those interested may have time and opportunity to examine the account and come prepared to contest it.

Nothing of this kind was done in this case, and the accounts were not produced until the day of final settlement. [7 Porter, 270.]

Nor does the record show that any of the distributees were present, or that the Minors had guardians to protect their interests.

No decree appears to have been rendered for the distributive share of the widow, or any cause assigned for its omission.

The division and final settlement must therefore be reversed and the cause remanded for further proceedings.

UPSON v. AUSTIN.

1. The offence of usury is not complete so as to enable a common informer to sue for the penalty given by the statute until the money, &c. has been taken, accepted or received.
2. When a cause is submitted to a jury on two counts of a declaration, one of which is bad and the other good, and the evidence sustains the bad count only, it is not error to refuse to charge that the plaintiff is entitled to recover generally. If the plaintiff wishes a verdict on such evidence, he must request the Court to charge the jury that he is entitled to a verdict on that count only to which his evidence applies; the evidence showing no legal cause of action.

Upson v. Austin.

WRIT of Error to the Circuit Court of Perry county.

Action of debt *qui tam* to recover a penalty under the act to regulate the rate of interest.

The declaration has two counts; the first of which charges the taking, accepting and receiving of seven hundred and fifty dollars for the loan of three thousand dollars, from the 20th April, 1839, to the 1st April, 1840, by reason of a corrupt contract between the defendant and one Samuel Child.

The second count alleges the taking, accepting and receiving the unlawful interest by taking the note of the borrower for three thousand seven hundred and fifty dollars for the loan of \$2,950, for the same space of time, in pursuance of a corrupt contract, &c. This count sets out the entire contract for the reservation of the illegal interest, charging the taking accepting and receiving of eight hundred dollars in the said note as usury, but it does not aver that the note or any portion of it has been paid.

The defendant demurred generally to the declaration, but the Court overruled the demurrer, and a verdict was afterwards returned for the defendant, on which judgment was rendered.

It appeared at the trial that the usurious contract was made as alleged in the second count, but there was no proof that any payment had ever been made on the note. The Court charged the jury, that although the contract was usurious, yet as there was no proof of payment, the plaintiff was not entitled to recover.

The plaintiff excepted, and now assigns as error that the Court erred in this charge.

GRAHAM, for the plaintiff in error, insisted that the statute intended to give the penalty upon the *making* of the usurious contract, and that the *taking, accepting and receiving* named by the statute, must be construed to mean any reservation of usurious interest. Without such a construction no effect can be given to the three years limitation. And the whole act must receive effect if effect can be given to it. [Digest, 437; 4 Porter, 136; 1 Dyer, 95, a.; Rutherford's Institutes, 416; 2 Cranch, 33, 52; 5 Wheat. 56, 76.]

At all events, the Court should have charged the jury to find for the plaintiff, because the evidence was in strict conformity with the second count. [3 Porter, 43, Hazard v. Purdom.]

PORTER, contra, cited Fisher v. Beasley, 1 Day; Loyd v. Williams, 3 Wilson, 250; Maddock v. Stannett, 7 D. & E. 184; Commonwealth v. Frost, 4 Mass. 460; Brook v. Middleton, 1 Camp. 445; Sampson v. Warren, 15 Mass. 460; Benbow v. Parker, 1 H. Black. 283; Borrowdale v. Middleton, 2 Camp. 53. As to the *proviso* of the statute, it can never be admitted to add to the enacting clause or add to the penalty previously imposed. The sole effect of a *proviso* is to limit and explain.

GOLDTHWAITE, J.—1. The present action is founded on the 2d section of the act of 1819, entitled an act to regulate the rate of interest, which is in these words:

“Every person who, upon any contract, shall take, accept, or receive, by way or means of any corrupt bargain, loan, exchange or shift of any money, goods, wares, merchandize, commodities, or bonds or notes, or other thing whatsoever, above the rate of eight dollars for the forbearance or giving day of payment of one hundred dollars for one year, and so after that rate for a greater or less sum, or for a longer or shorter time, and so after that rate or proportion for goods, wares merchandize, commodities, bonds or notes, when such shall be lent, contracted or agreed for, taken, accepted or received, shall forfeit and lose for every such offence, the whole value or amount together with all interest thereon; one half of which forfeiture shall be paid into the public treasury for the use of the State, and the other half to him or them that will inform and sue for the same, to be recovered with costs by action of debt, in any Court of record in the State: *Provided*, That if the borrower should be the informer as aforesaid, the whole amount thus recovered shall be paid into the treasury for the use of the State: *Provided also*, That every such action of debt as aforesaid, shall be commenced and sued in the lender’s lifetime, or within three years after the commission of the offence, or *within one year after the time of payment of any money, goods,*

wares or merchandize, contracted to be paid on any usurious agreement or contract."

The question to be determined is, at what time and by what act is the offence of usury complete, so as to give the right to sue for the penalty?

When only the body of the section is examined, it seems perfectly clear that the *taking, accepting or receiving* of the illegal interest contracted for is necessary to consummate the offence. Additional force is given to this construction by the first and fourth sections of the act, the former of which has the effect to avoid all usurious contracts, and the latter expressly declares that the obligor of any note or bond given on account of any usurious contract shall be forever exonerated therefrom. It is therefore certain that these sections impose on the lender the liability to lose the entire sum lent or contracted for, and hence it would be most unreasonable to create additional forfeiture by mere implication. Independent of this view, it may be said that the contract to take illegal interest only evinces an intention to violate the statute, which is punished by the nullity of the contract, and that therefore the object of the statute never could have been to inflict a double punishment for a mere intention not carried into effect.

The doubt with respect to the proper construction of the statute arises out of the last clause of the second proviso; which directs that the action for the penalty shall be brought within one year after the time of payment of any money, &c. contracted to be paid in any usurious agreement or contract, and because this is comparatively inconsistent with the second clause of the same proviso, it is inferred that the evading clause must be extended, so as to give every term of the proviso its fullest effect. It may be conceded that it is difficult to conceive how the action may be brought within three years after the commission of the offence by the *receipt* of the money contracted for, and yet within one year after the time of payment contracted for, yet if there is any such condition in which a contract may be placed, all the terms of the proviso will be filled.

This would be the case where money was contracted to be paid at a distance of four years. Then if the payment was made in advance of the time and within two years after the

making of the contract, full effect could be given to each of the limitations. It may be said this would be a forced construction, but in our opinion it is not so much so as to extend the enacting clause by any implication arising from the uncertainty of the proviso. If, however, we were driven to that necessity, we should declare that the different clauses of the proviso inconsistent with each other, were ineffectual for uncertainty, rather than extend the statute beyond what seems to have been the manifest intention.

Our conclusion then is, that no right to the penalty is given until the receipt of the money contracted for as interest, and that it does not attach at the time of the contract.

2. It is said however that the plaintiff, on the pleadings and proofs was entitled to a verdict. To sustain this position the case of Hazard v. Purdom, [3 S. and P. 43,] is relied on. There evidence was given to sustain a bad plea, on which issue was taken, and it was held the party was entitled to a verdict according to the issue, and independent of its merits; but then the charge was requested as applicable to the particular issues. So in this case, we might not feel disposed to deny the right of the party to a verdict on the second count of the declaration, if he had asked a charge applicable alone to that, but as he did not do so, and as the evidence did not make out a legal cause of action, although it supports the second count, which is defective and bad under the view we take of the statute, this point of the case is precisely within the principle of the decision of Cullum v. The Branch Bank of Mobile, at this term.

There is no error in the record, and the judgment is affirmed.

Doe ex dem. Brown and Wife v. Hunt & Clements.

DOE EX DEM. BROWN AND WIFE V. HUNT & CLEMENTS.

1. The act of Congress of 1820, in respect to the division of fractional sections, is not to be construed as imperative in requiring those that contain more than one hundred and sixty acres, to be so divided in all cases as to make half quarter sections, though its length and breadth admits of the formation of several.
2. Where a patent described the land conveyed by it thus, "the south-west quarter of section twenty-two, &c. containing ninety-two acres and sixty-seven hundredths of an acre, according to the official plot of the survey of the said lands returned to the General Land Office, by the Surveyor General;" Held—that ninety-two 67-100 acres, as indicated by the subdivision marked on the "official plot," was all that could be claimed under the patent.

THIS was an action of ejectment, brought by the plaintiffs in error, in the Circuit Court of Mobile for the recovery of "the east half of the south-west quarter of fractional section number four, south of range number one, west, in the district of land subject to sale at St. Stephens, Alabama, containing eighty acres." The defendants, under the consent rule, confessed lease, entry and ouster, and the cause was tried on the plea of *not guilty*. On the trial a bill of exceptions was sealed at the instance of the plaintiff, from which it appears that James Etheridge, by notice addressed to the Register and Receiver of the Land Office at St. Stephens, on the 28th January, 1831, claimed the right of pre-emption under the act of Congress of the 29th May, 1830, to the south-west quarter of section twenty-two, township four, and range one, west. Afterwards, on the 30th May, 1833, a patent in due form was issued to Etheridge "for the south-west quarter of section twenty-two, in township four, south of range one, west, in the district of land subject to sale at St. Stephens, Alabama, containing ninety-two acres and sixty-seven hundredths of an acre, according to the official plot of the survey of the said lands, returned to the General Land Office, by the Surveyor General."

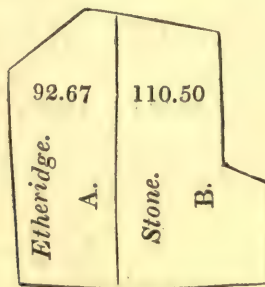
On the part of the defendants it was shewn, that Wm. D. Stone, on the 25th March, 1831, by a notice addressed to the Register and Receiver of the Land Office at St. Stephens, claimed the right of pre-emption, under the act of the 29th May,

Doe ex dem. Brown and Wife v. Hunt & Clements.

1830, to the fraction situated in the west part of the south-east quarter of section twenty-two, in township four, range one west of thirteen. Afterwards, on the 17th day of December, 1832, a patent was issued in favor of Stone, "for the south-east subdivision of fractional section twenty-two, in township four, south of range one, west, in the district of lands subject to sale at St. Stephens, Alabama, containing one hundred and ten acres and fifty hundredths of an acre.

It was admitted that the plaintiffs have the entire interest which by the patent was conveyed to Etheridge, and the defendants were entitled to the land of which Stone was the patentee. It was proved that the fractional section might be so subdivided as to survey an entire south-west quarter, without interference with any private land claim, leaving a residuum in the section, both on the north and on the east; and that the contents of the section were two hundred and ten acres, although the government survey indicated but two hundred and three 17-100 acres.

The following diagram demonstates the form of the fractional section, with its subdivisions, as it is shown by the books of the Surveyor General.



The plaintiffs proved that the subdivision marked on the diagram had never been made by the Surveyor by running and marking the line on the ground, but posts were found on the west and south lines, each a half a mile from the south-west corner, which appeared to have been placed there by the United States Surveyor.

The Court instructed the jury that if they believed the evidence they must find for the defendant. *And further*, that if

Doe ex dem. Brown and Wife v. Hunt & Clements.

said fractional section twenty-two was capable of being subdivided into an entire south-west quarter section, or two half quarter sections, leaving a residuum still, the Surveyor General was not required under the acts of Congress providing for the subdivision of the public lands, and the instructions of the Secretary of the Treasury, made under the act of 24th April, 1820, entitled "an act making further provision for the sale of the public lands," to make in his subdivision of the same, either such quarter section or half quarter sections; but might lawfully subdivide the same into two lots, as indicated by the diagram, and that under such a subdivision Etheridge's patent did not entitle him to a quarter section, but only to the eastern lot marked A. while the western lot, B., vested in Stone, in virtue of his patent. The plaintiffs objected to a part of the evidence offered by the defendants, but no exception was taken to the decision of the Court overruling the objection. The jury returned a verdict for the defendants, and judgment being thereon rendered, the plaintiffs prosecuted an appeal to this Court.

SHERMAN, with whom was CHAMBERS, for the plaintiffs, insisted that the laws regulating the survey of the public lands requires that fractional sections containing one hundred and sixty acres or more, must, if practicable, be so subdivided as to make one or more quarter sections. That the subdivision which appears on the books of the Surveyor General's Office was unauthorized, as the fractional section of which the land in question is a part, might have been so divided as to make a south-west quarter, leaving a fraction on the east and north. Although the patent to Etheridge states the number of acres to be ninety-two 67-100, yet the description of the tract as a quarter section, is equivalent to a designation of length and breadth, and will control what is said as to quantity. They cited and commented upon the acts of Congress of 1796, 1800, 1804, 1805, 1820, 1824, 1830, 1832, in relation to the survey and disposal of the public lands, pre-emption rights, &c. Also the second part of the work upon Public Lands, edition of 1838, containing instructions of the Secretary of the Treasury and Commissioner of the Land Office, and opinions of the Attorney General, see pages 1035, 180-1-2-3-7, 921, 820, 826-7, 819, 854, 933-4, 136, 555, 363-8, 372.

Doe *ex dem.* Brown and Wife *v.* Hunt & Clements.

The plaintiffs also relied on 6 Cow. Rep. 607; 6 Cranch's Rep. 237; 5 Mason's Rep. 410; 1 Paine's Rep. 496; 6 Cranch Rep. 165; 4 Stew. and P. Rep. 396; 2 Por. Rep. 40-3; 7 ib. 432; Wheeler's Com. L. Cases Tit. Boundary, 488-9-90; 1 and 2 Ohio Rep. 144; 3 Stew. Rep. 76; 1 Ohio, 170; 1 Peters' Rep. 665; 5 Porter's Rep. 327; 3 Stew. and P. Rep. 105; 4 Stew. and P. Rep. 32; 5 Porter's Rep. 245; 1 Pet. Rep. 13; 6 ib. 345; 3 Louisiana Rep. 59; Peters' C. C. Rep. 496; 13 Pet. Rep. 498; 5 Wheat. Rep. 293; 7 ib. 212; 11 ib. 380; 10 ib. 662.

CAMPBELL, for the defendants. The opinion of the Attorney General of the United States upon the present case, when it was under the examination of the Secretary of the Treasury, if it is to be regarded as authority, explicitly states that the fractional section was subdivided according to law. [2d part of the work on Public Lands, 136.] The opinion of the Attorney General is sustained by the instructions of the Secretary of the Treasury, under the act of the 24th April, 1820, [ib. 820,] and these instructions have been followed in the survey of the public lands, [881, 854, 922.]

But the opinion of the Attorney General is correct, independent of the exposition of the act of 1820, which had been previously made by the Secretary of the Treasury.

Again—the defendants claim under the oldest patent, which appropriates the land in the eastern subdivision, but if the survey is to be changed Stone's patent must cover a quarter section, instead of Etheridge's.

Lastly—the patents call for the map made of the fractional section, and it is not permissible to claim under a survey never made as indicated by the map itself. [4 Peters' Rep. 332.]

COLLIER, C. J.—The first charge of the Court, conceding the truth of all the evidence, affirms that the plaintiffs have not made out a case which entitles them to recover. The second declares, that although the fractional section twenty-two was susceptible of division, so as to make an entire quarter section and leave a residuum, yet neither the acts of Congress providing for the subdivision of fractional sections, or the in-

Doe ex dem. Brown and Wife v. Hunt & Clements.

structions of the Secretary of the Treasury under the act of the 24th April, 1820, made such a division indispensable; but it was entirely regular to divide the fraction into two tracts by a north and south line.

It is needless to notice all the acts of Congress in relation to the survey of the public lands, which have been cited by the plaintiff's counsel; the act of 1820 is the only one that is pertinent to the present inquiry. The first section of that enactment, after directing that the government lands shall be offered at public sale in tracts of half quarter sections and providing for the subdivision of sections upon the principles of the second section of the act of February, 1805, proceeds, "and fractional sections containing one hundred and sixty acres and upwards, shall in like manner, as nearly as practicable, be subdivided into half quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Treasury; but fractional sections containing less than one hundred and sixty acres shall not be divided, but shall be sold entire: *Provided*, That this section shall not be construed to alter any special provision made by law for the sale of land in town lots." [Land Laws, 1 part, 323.]

By a Circular of the 10th June, 1820, addressed to the Surveyors General, in pursuance of the act of the 24th April, 1820, "the Secretary of the Treasury directs that fractional sections containing more than one hundred and sixty acres shall be divided into half quarter sections, by north and south, or east and west lines, so as to preserve the most compact and convenient forms." "It is not intended to run the subdivisional lines, and mark them, but merely to make them upon your surveys, and calculate the quantity of land in each subdivision." [Public Lands, 2d part, 820.]

The Commissioner of the General Land Office, in a letter to the Surveyor General of Mississippi, under date the 20th January, 1826, remarks, that prior to the act of April, 1820, fractional sections were not liable to be subdivided. After referring to the Circular of the 10th June, 1820, he says: "The substance of the rule is, that the fractional sections of one hundred and sixty acres and upwards, are to be subdivided by east and west, or north and south lines, (at the discretion of the surveyor,) so as to preserve the most compact and convenient form.

Doe ex dem. Brown and Wife v. Hunt & Clements.

Each lot to be *as nearly as practicable*, a half quarter section, containing the quantity of eighty acres; sometimes rather more, sometimes less, as the locality demands." [Land Law, 2d part, 854.] In a letter from the same to the same, of the 28th July, 1831, instructions substantially similar, are repeated. [Ib. 922; see also, ib. 933.]

The regularity of the survey of the fractional section now in question was brought to the view of the Attorney General of the United States by the Secretary of the Treasury in 1837, and his opinion given thereon. He says that the instructions on the 10th June, 1820, in relation to fractional sections, "as I am informed, has been understood in the General Land Office, and by the Surveyors, to authorize the course adopted by the Surveyor General in the present case; and I shall assume that it did so. I make this assumption because the Department is perfectly competent, and best qualified to construe its own instruction; and because, unless such was its meaning, no question of law under the act of 1820, could well arise for my consideration, for if the instruction required, as contended by the counsel for Mr. Etheridge, that all the regular half quarter sections of which the fractional section is susceptible, shall be actually formed, then the survey should have been set aside for its non-conformity to the instruction.

"The matter is then narrowed to the question whether the instruction of 1820, construing it as the Surveyor General has done in the present case, is a legal and valid exercise of the discretion committed to the Secretary of the Treasury, by the act of the 24th April, 1820, above quoted. It will readily occur that to authorize me to pronounce an instruction of this nature, issued immediately after the enactment of the law, and acted on for so long a period, illegal, the objection should be a very clear one. This is by no means the case in the present instance."

The Attorney General then concludes that the division of the section into two fractions of more than eighty acres was in conformity both to the law and instructions, although it was practicable so to have divided it as to have made a quarter section, leaving a residuum both on the north and east. This conclusion was influenced by these reasons:

1. If Congress had intended that fractional sections should,

Doe ex dem. Brown and Wife v. Hunt & Clements.

at all events, be divided into half quarter sections, when their shape admits it, they would have said so in explicit terms, and the discretion confided to the Secretary would have been confined to the residuary parts of the section.

2. The clause in the first section of the act of 1820, concerning fractional sections containing less than one hundred and sixty acres, (which are not to be divided,) shows that Congress did not deem it indispensable that regular half quarter sections should, *in all practicable cases*, be formed by the surveyors; on the contrary it shows that they preferred a single tract, though containing more than eighty acres, and though capable of forming a regular half quarter, to small and inconvenient fractions.

3. The pre-emption laws did not change the general system established for the survey of the public lands.

The view taken of this matter by the Attorney General is so very clear and satisfactory as not to require amplification. It shows that the division of the section is authorized by law, and even if it was not, then it should have been set aside by the Department as irregular. The description of the land by quantity, is in general much less conclusive than by courses and distances, or metes and bounds to indicate the precise tract; but these in turn yield to more satisfactory *indicia* of locality. In the case before us, the patent designates the number of acres, and refers to the official plot of survey of the section returned to the General Land Office, by the Surveyor General. Now although a quarter section of lands is a parcel defined as to quantity, the form and contents of which are regulated by law, yet these descriptive terms are not so potent as to override and control all others that may be found in connection with them. Here the patent conveys *eo nomine* a quarter section, though it contains in fact but little more than half that quantity *according to the official survey*; these latter terms of description must be wholly inoperative, or serve to limit the land granted to the western subdivision of the section; that the latter conclusion is the most consonant to reason and authority is what we cannot doubt. [Cheny v. Slade's adm'r, 3 Murphy's Rep. 82; Blake et al v. Doherty et al, 5 Wheat. Rep. 359.]

The sales of the Government lands are made according to

Gray v. Thacker, use, &c.

subdivisions of sections, or fractions, actually made on the ground, or to lines traced on the maps prepared in the office of the Surveyor General; hence, a patent issued to a purchaser, refers to the official plot of the survey, returned to the General Land Office, and according to this will the patentee take.

Supposing the subdivision of the fraction in question to have been made according to law, and the recital of the quantity of land sold to Etheridge will show, that he did not purchase a quarter section; and if the official plot was irregular it should have been set aside by the Department, and the proper steps taken in order to its correction.

Upon a view of the case, I am satisfied that the subdivision of the fractional section was in conformity to law, and if it was not, the plaintiffs cannot recover more land than is embraced by the patent under which they claim. The consequence is, the judgment of the Circuit Court is affirmed.

NOTE.—Judges GOLDTHWAITE and ORMOND being interested in the decision of this case, did not participate therein.

GRAY v. THACKER, USE, &c.

1. When the husband and wife are sued for a debt of the wife, while sole, the judgment must be against both, and if judgment be rendered against the husband alone, it will be reversed on error.

ERROR to the Circuit Court of Coosa.

Action of debt commenced by the defendant against the plaintiff in error before a Justice of the Peace.

Gray v. Thacker, use, &c.

The warrant is against William M. Gray, to answer the complaint of J. R. Thacker in a plea of debt, executed by Caroline R. Burton, now the wife of the said W. M. Gray. The Justice of the Peace allowed an off-set claimed by the defendant and rendered judgment in his favor.

The cause being carried by certiorari to the Circuit Court, the plaintiff filed a statement of his cause of action in these words:

J. R. THACKER, USE, &C.

VS.

WILLIAM M. GRAY and his wife, **CAROLINE GRAY.**

Plaintiff states that Caroline Burton made her note, payable to the plaintiff for twenty-one dollars and fifty cents, for value received, dated 4th February, 1839, and due one day after date. Since the making of said note, and before the commencement of this suit, she has married said defendant, whereby he became liable to pay said note to the plaintiff. Damage fifty dollars.

To this statement the defendant cravedoyer of the warrant, and pleaded in abatement a variance between the warrant and the statement, in this, that the warrant was sued out against Gray alone, and the statement was against him and his wife.

To this plea the plaintiff demurred, which the Court sustained, and gave judgment for the plaintiff for the debt.

From this judgment this writ is prosecuted by the defendant who assigns for error—

1. The judgment of the Court sustaining the demurrer.
2. In giving judgment against plaintiff in error.
3. In giving judgment against plaintiff in error alone, when the statement is against him and his wife.

POPE, for plaintiff in error.

MORRIS, contra.

ORMOND, J.—We consider, that in accordance with the liberality which has always been extended towards proceedings before Justices of the Peace, by this Court, the warrant may be considered as sued out against the plaintiff and wife jointly, and that the statement follows the warrant. But the

judgment being against the defendant alone, cannot be sustained. The judgment must be against all who are parties to the writ and declaration; and especially in a case like the present, where, if the judgment were properly rendered, in the event of the death of the husband, would survive against the wife, but as this judgment is rendered would survive against the representative of the husband.

Let the judgment be reversed and the cause remanded.

WITHERS v. KNOX.

1. Where the contract is to pay a sum of money in promissory notes, due at a specified time and to be endorsed by the defendant, it is not a sufficient breach to aver that "the defendant, though often requested, has not paid the said sum of money in the said promissory note specified."

WRIT of Error to the Circuit Court of Greene county.

Assumpsit on a note which is described in the declaration as bearing date the 20th November, 1838, whereby the defendant promised to pay to the plaintiff, for value received, (it being for six mules delivered to the defendant,) the sum of eight hundred and fifty dollars in notes due the first day of January then next, and these were to be endorsed by the defendant. The breach is in these words—"yet the said defendant, though often requested so to do, hath not as yet paid to the said plaintiff the said sum of money in the said promissory note specified, or any part thereof."

The defendant demurred, and the Court gave final judgment on the demurrer in favor of the plaintiff. The defendant insists that this judgment is erroneous.

THORNTON, for the plaintiff in error, cited 5 Dana, 140; 1 Chitty Plead. 365; 7 Dana, 171.

CLARK, contra, relied on *Brahan v. Debrell*, 1 Stewart, 14; 1 Chitty Plead. 326.

GOLDTHWAITE, J.—The breach in this case is clearly insufficient. The contract is to pay a certain sum in promissory notes, due at a specified time; the money could not be demanded on this contract until there had been a failure to deliver notes according to the agreement, therefore an averment that the money was not paid, is not sufficient to show that the contract was broken.

It is said by Mr. Chitty, that the allegation of the breach, must obviously be governed by the nature of the stipulation. It should be assigned in the words of the contract, either negatively or affirmatively; or in words which are co-extensive with the import and effect of it. [1 Chitty on Plead. 365.] And in general, if a breach be assigned in words containing the sense and substance of the contract, it is sufficient. [Ib. 366.] The sense and substance of this contract is to pay promissory notes, endorsed by the defendant, and cannot be construed as an absolute engagement to pay a sum of money, without a manifest violation of the intention of the parties. It is not material to consider what consequences flow from the breach of this contract, with respect to the ascertainment of damages, because that is not the matter now to be determined: the only question is as to what constitutes a breach of the contract. If the form of the instrument was slightly varied, and so as to read, "to pay to the plaintiff promissory notes to the amount of eight hundred and fifty dollars, due on the first January," it would free the subject from all doubt; yet in that form the contract would have no term involved which is not now contained in it, and consequently must be the same in its legal effect.

We are satisfied the declaration is not sufficient on demurrer. Let the judgment be reversed and the cause remanded.

CARTER AND CARTER v. PENN.

1. A writing with a scroll in which is written the word "seal," at the end of the name of the party signing it, is not a sealed instrument; unless it appears from its body that the parties intended to give to it that character.
2. A promissory note to pay a sum in "current money of the State of Alabama," is, in legal effect, an undertaking to pay in gold or silver coin.

WRIT of Error to the Circuit Court of Talladega.

The defendant in error declared against the plaintiffs in *assumpsit* on a promissory note made by them on the 26th March, 1840, for the payment of the sum of eight hundred and fifty-three 47-100, current money of the State of Alabama, to him, one day after date. It is averred that the money in which the note is payable is of the value of the sum expressed in the note.

The defendant pleaded several pleas, and on the trial he demurred to the evidence. From the demurrer it appears that the plaintiffs adduced a note in these words, viz:

"One day after date, we or either of us oblige ourselves, our heirs, &c. to pay, or cause to be paid, unto Thomas Penn, his heirs or assigns, the just and full sum of eight hundred and fifty-three dollars and forty-seven cents, current money of the State of Alabama, it being for value received, this 26th day of March, 1840.

JOHN W. CARTER, [seal.]

HENRY CARTER, [seal.]"

It was also proved that payment of the note was demanded of the makers before suit brought. On this evidence the Circuit Court rendered a judgment in favor of the plaintiff for the amount of the note and interest.

CHILTON, for the plaintiff in error.

MOODY, for the defendant.

COLLIER, C. J.—The questions raised by the demurrer to the evidence, are—1. Was not the writing produced at the trial a

sealed instrument? 2. Was the plaintiff entitled to recover the full amount of the sum expressed on its face, without reference to the value of Alabama currency?

1. By the act of the 2d February, 1839, it is enacted, "That all covenants, conveyances, and all contracts in writing, which import on their face to be made under seal, shall be taken, deemed and held to be sealed instruments, and shall have the same effect as if the seal of the party or parties were affixed thereto, whether there be a scroll to the name of such party or parties or not."

Previous to the passage of this act, it was necessary, in order to constitute a sealed instrument, not only that it should appear from the body of the writing that the parties intended thus to characterize it, but it was also necessary to accompany its execution with a scroll, or some other indicium of a seal. [Lee v. Adkins, Minor's Rep. 187.] The only change in the law proposed to be effected by the statute, was to dispense with a scroll or its equivalent, and to make the recognition of the parties in the body of the paper that it was sealed, impart to it the dignity of a deed.

2. The note does not stipulate for the payment of a debt in Bank bills, but is an undertaking to pay "current money of the State of Alabama." It is true that an infinite variety of commodities have been used as money in different periods and countries, [2 McC. Com. Dic. 193,] and in common parlance all these different representations of the common standard of value, have been designated as money. But the notes of the Banks which are not redeemable in coin, on demand, cannot, with any propriety be regarded as such; in fact the best Bank paper passes as money by consent only, and it cannot be otherwise so long as the inhibition of the Federal Constitution upon the rights of the States to dispense with gold and silver as the only lawful tender continues in force.

It results from this view, that the judgment of the Circuit Court is affirmed.

FORD v. FORD ET ALS.

1. A marriage took place in Virginia, in 1797. After a few years cohabitation the husband and wife separated—the husband left the State of Virginia, came to this State, and in 1817 married another woman, who was ignorant of the first marriage, and who had two children by her supposed husband; the first wife, after the separation, had two illegitimate children. In 1837, the husband by deed conveyed all his property, real and personal, to trustees, for the benefit of the second wife and children, reserving to himself an annuity of a thousand dollars a year during his life, and died in 1839. Upon a bill filed by the first wife to set aside this deed, to have dower allotted to her in the real estate, and for her distributive share of the personalty—Held, that the second wife and children were purchasers for a good consideration of the property conveyed by the deed, and that as their equity was at least as good as that of the first wife, a Court of Chancery would not interfere.
2. A marriage may be proved by cohabitation as man and wife, reputation, &c. in all cases except on a trial for bigamy, or in an action of *crim. con.*

APPEAL from the Chancery Court, sitting for Madison county.

This was a bill filed by the plaintiff in error against the defendant in error. The bill sets forth the marriage of the complainant with Hezekiah Ford in Virginia, in 1797—that he abandoned her without cause, having received in her right a considerable property, came to Alabama and entered into a pretended marriage with the defendant, Nancy N. Ford, and died intestate in 1839—that when in bad health and for the purpose of defrauding complainant he made, in June, 1837, a deed of trust conveying all his property of every description to trustees, reserving to himself an annuity of one thousand dollars—at his death the property to go principally to the defendant and her two children, the fruit of the pretended marriage. The bill charges that the deed is testamentary in its character, and was intended to operate in lieu of a will, to defraud complainant. That with the same fraudulent intention and purpose, about sixteen months before his death, he purchased several tracts of land, and caused the title to be made to the defendant and her children, without any consideration therefor

on their part. The prayer of the bill is that the deed of trust be set aside and cancelled, and that the complainant have her dower allotted her out of the realty, and for her distributive share of the personal estate.

Defendant, Nancy N. Ford, denies all knowledge of the first marriage, but admits that complainant and deceased commenced living together, as man and wife, in Virginia, in 1797; that complainant was unchaste, and that the deceased abandoned her and came to this State, and that afterwards she had illegitimate children, and relies on a statute of Virginia by which adultery is made a forfeiture of dower—says she was legally married to Ford in 1817, without any knowledge that he was married, and supposing him to be a single man—admits the execution of the deed of trust, but denies the fraudulent intent, or that Ford was in declining health—that the deed was made to dispose of his property instead of a will, but not as his will.

The answers of the other defendants are not important.

The evidence shows the want of chastity of complainant, after the separation. Her marriage with Ford is proved by one witness who was present—by the production of a copy of the bond preparatory to obtaining a license, and by many witnesses, of reputation and cohabitation as man and wife.

The marriage of defendant and Ford is proved to have been legally solemnized in Madison county, in 1817, and that Ford was then represented to be a single man. A physician proved the health of Ford to be bad in October, 1837—that he knew his situation and anticipated a speedy death. There was also record evidence of the property received by Ford in right of his wife, the complainant.

The Chancellor decreed dower to the complainant out of the land to which Ford had a legal title, and dismissed the bill as to the residue.

From this decree the complainant appealed, and assigns for error the dismissal of the bill.

McCLUNG, for the plaintiff in error. The adultery of the complainant is not proved, but if it was, is no bar to dower at common law, and the common law is in force in this State, having never, in this particular, been altered by statute.

He admitted that a man might make a *bona fide* gift of his

Ford v. Ford et als.

property, but it must be a gift "*out and out*,"—that is, he must not reserve an interest in it, to defeat the complainant's right under the statute. [19th Vesey, 64; 2 Vernon, 202, note 3, 277, 612; 2 Story's Eq. 94; 5th Johns. C. 539.] He insisted this was a will in disguise, the form of a deed being given to it to prevent the complainants right of dissent.

PARSONS, *contra*. The misbehaviour of the wife destroys her right to maintainance, and will prevent her being countenanced in this Court. [2 Atkins, 97; 1 Roper, 271, 282; 1 Story's Eq. 77.]

He insisted that the cases referred to on the custom of London were not analagous, because, under that custom, the wife and children were considered as purchasers. [1 Atkins, 275; 2 *ib*. 97.]

He insisted that the conveyance by the deed to the second wife and children was not voluntary, but on a good and meritorious consideration, and should be supported. [Chitty on Con. 215.]

That there was no pretence of right in the complainant as the lands purchased after the execution of the deed of trust—that as to them Ford had neither a perfect equity nor a resulting trust.

ORMOND, J.—This bill is filed by the plaintiff in error, insisting that she was lawfully married to Hezekiah Ford, deceased, in Virginia, in 1797, that he abandoned her a few years after, having received in her right a considerable property—that he came to this State, and in 1817 entered into a pretended marriage with the defendant, Nancy N. Ford, and died intestate in 1839—that whilst in bad health, laboring under a fatal chronic disease, and in contemplation of death, to defraud complainant, he conveyed all his property of every description to trustees, for the benefit of his last wife and her two children, reserving to himself an annuity of a thousand dollars a year, during his life, which deed, the bill alledges, was executed in lieu of a will, and to take effect at his death.

It was argued by the defendants in error, that there was no sufficient proof of the first marriage. Upon an indictment for bigamy, and in the action for criminal conversation, the fact of

the former marriage must be proved by the production of the record of the marriage, or by a witness present at the ceremony. In all other cases, cohabitation as man and wife, reputation, the acknowledgment of the parties themselves, their reception as man and wife by their relations, &c. will be sufficient proof of the fact, or at least raise a presumption, that a marriage in fact took place until the contrary is shewn. The proof in this case goes far beyond those presumptions which are usually held proof of a marriage in fact, and leaves no doubt whatever that the parties were legally married, as stated in the bill.

The ground of the claim asserted by the bill is that the deed in favor of the second wife and the fruit of that connection, is a fraud upon the rights of the first wife. Whilst it is admitted that the husband might have made a perfect gift during his life of all his personal property, and thus have prevented his wife from receiving any portion of it under the statute of distributions, it is insisted that such gift must be complete, and that in this case the reservation of a thousand dollars a year during the life of the grantor, shows that the gift was not *bona fide*, but merely intended to defeat the rights of the complainant.

This is certainly a case of the first impression, at least in this country. The authorities cited in support of the view taken by the counsel for the plaintiff in error, and the cases in 2d Vernon, which arose on the custom of London, and a passage in the work of Mr. Justice Story on Equity, upon the authority of a recent case in the House of Lords, which he states as a curious case, illustrating the extent to which Courts of Equity will go to enforce the specific performance of contracts in cases where a fraudulent evasion is attempted. "If a person covenants or agrees, or in any other manner validly binds himself to give to A. by his will, as much property as he gives to any other child, he may put it out of his power to do so by giving all his property in his lifetime. Or if he binds himself to give to A. as much as he gives to B. by his will, he may in his lifetime give to B. what he pleases, so as by his will he shall give to A. as much as he gives to B. But then the gifts that he makes in his lifetime to B. must be out and out. For if to defraud or defeat the obligation he has thus entered into he gives to B. any property, real or personal, over which he retains any con-

trol, or in which he reserves an interest to himself, then, in order to protect the agreement or obligation which he has thus entered into, and to defeat the fraud attempted upon that agreement or obligation, and to prevent his escaping as it were from his own contract, Courts of Equity will treat this gift to B. in the same manner as if it were purely testamentary, and were included in a will. [2 Story's Eq. 94, §786.]

Without at all questioning the authority here cited, we are of opinion that this case is entirely dissimilar. The decision in the case cited by Mr. J. Story, was made on the ground of contract, the performance of which was attempted to be evaded; but the right which a wife has to a portion of her husband's personal estate, after his death, is not in the nature of a contract with the husband. He has by law, during his life, the most absolute and unqualified dominion over it. The only restriction which has been imposed on him in favor of his wife is in its disposition after his death by will. It is difficult then to conceive how a disposition of property made in the lifetime of the husband, and to take effect immediately, could be fraudulent against the wife, as no right whatever vests in the wife until his death. Her title is derived, not from contract, but is vested in her by law and has no existence whatever until his death.

It is not necessary to consider the effect of the cases cited on the custom of London, in which certain dispositions of property were considered in fraud of the custom, nor is it necessary to enter upon the inquiry whether there is not a distinction between the right vested in the widow and children by the custom of London to a part of the personal estate of a *freeman* of the city, not disposed of in his lifetime, and the right under the statute of distribution, because we are of opinion that the second wife and her children are not mere volunteers.

The beneficiaries under the deed sought to be set aside, are those who had the highest possible claim on the deceased—they are the woman whom he induced to unite herself with him under the belief that she was becoming his wife, and the fruit of that connection—to provide for these persons he was under the highest possible moral obligation. The consideration therefore for the deed was at least a good one. Nor would it be possible for a Court of Chancery, in passing on the relative claims

of the first and second wife, to hold the first entirely guiltless of the consequences which have resulted to the second, from her connection with Ford.

Although the evidence does not conclusively point to the plaintiff in error as the guilty cause of the separation, yet her conduct since that event has been such as at least to cast suspicion over her moral character before that time. The equity of the plaintiff in error, abandoned by her husband near forty years since, which has been acquiesced in by her during all that time, could not, in a Court of Equity, in any possible view stand on higher ground than that of the second wife, upon whom no imputation can be cast, and who was ignorant of the rights of the plaintiff in error, if any she had. Conceding then the equities to be equal, under the circumstances of this case, the second wife and her children must be considered purchasers for a good consideration, and as such entitled to hold the property at least against all whose equity is not superior.

In the English Chancery a decree is never made under marriage articles against the heir at law, even when otherwise provided for by the ancestor, unless those asking the aid of the Court are such as the settler was under a moral obligation to provide for, as in the case of a wife and children. [See the cases collected on this head in Atherly on marriage settlements, 131 to 138.] These cases show the extent to which a Court of Chancery will go in upholding *imperfect* settlements in favor of a wife and children, even against so favored a class as heirs at law in England.

The argument that this deed is a will in disguise, is answered by the deed itself—it was an irrevocable disposition of the property conveyed by it, by which the title passed immediately out of the grantor, and vested in the defendants; it was therefore clearly not testamentary in its character. The imputation of fraud is repelled by the view already taken—that the grantor was under a high moral obligation to provide for those to be benefitted by the deed.

It results necessarily from this, that the Chancellor was right in refusing dower to the plaintiff in those lands purchased for the defendants after the execution of the deed, the legal title to which was never in the husband.

The appeal taken in this case, only brings to our notice the

decision of the Chancellor, refusing to set aside the deed and to allot dower in the lands purchased after the execution of the deed. In this there was no error, and his decree is affirmed.

CARSON v. THE BANK OF THE STATE OF ALABAMA

1. In a demurrer to evidence it was stated that the Cashier and assistant Cashier deposed that they believed, and had no doubt, that notice of nonpayment of a bill was deposited in the post office, directed to the drawer; that their belief did not arise from any recollection of the fact, as connected with the bill sued on, but from the course of business of the Bank—it was held that from this evidence a jury might properly infer that the usual course of business of the Bank furnished sufficient facts to warrant this belief; and if the party against whom such evidence is offered omits to inquire what this course of business is, he will not afterwards be heard in asserting that nothing is proved by it.
2. When the drawer resides in the vicinity of a town or city, a letter giving notice of nonpayment deposited in the post office, and directed to him at the same town or city where the letter is deposited, is sufficient to charge him.

WRIT of Error to the County Court of Tuscaloosa County.

This action was commenced as a summary proceeding, by motion under the statute in which the Bank recovered the amount of a bill of exchange, dated at Tuscaloosa, and payable in New Orleans, from Carson, as its drawer.

The judgment of the Court was given on a demurrer to evidence, and the proof is admitted to be sufficient, except so far as it relates to the notice of nonpayment, supposed to have been given to the defendant.

The proof in connection with this matter as disclosed by the demurrer was, firstly, the protest of the bill under the hand and seal of a notary—but the protest contains no statement whatever with respect to notice. Secondly, of the testimony of two witnesses, Hawn and Williams—the first of whom deposed that at the maturity of the bill in suit, a number of other bills

besides were protested; that he received a package of notices of protest from the notary at New Orleans, and handed them to Williams, who was assistant Cashier, to be forwarded by mail to the parties; that he could not say positively that notices had been received on the bill in suit, or that such were put into the mail at New Orleans on the day, or the day after, the bill was protested, but he believed they had been, and that they had been received here in due course of mail, which was about seven or eight days; which is the usual time of the arrival of the mail from that place, and forwarded immediately to the indorsers; that his conviction of these facts arose, not from any recollection of the facts with respect to the particular bill in suit, but from the course of business in the Bank.

Williams, the other witness, deposed that he was the assistant Cashier at the time of the maturity of the bill sued on, that he recollected a large package of notices of protest had come to the Bank of bills protested, [at the same time of] the maturity of the bill sued on; that he had no doubt of having put the notice of the protest in this case into the post office at Tuscaloosa, directed to Carson and to Ball, (the latter is a subsequent endorser of the same bill,) at Tuscaloosa; that he did not say so from any distinct recollection of the fact, but that such was the course of business in Bank, and he had no doubt of it; that Carson lived about five miles from Tuscaloosa, and he believed Ball and his family were then residing there, although he did not know such to be the fact.

PECK and COCHRAN, for the plaintiff in error, made two points:

1. That the evidence leads to no conclusion that notice was ever given. No fact is stated from which it can be reasonably inferred to have been sent by the Notary to Hawn, the Cashier. It may be conceded that Hawn and Williams' testimony might raise a reasonable presumption that they discharged their duty, but the true question was as to the performance of an act by the Notary in New Orleans.

2. That if notice was put in the post office at Tuscaloosa, directed to Carson, this was not sufficient to charge him without showing that he received it.

The post office can only be legitimately used for the trans-

mission of letters from one place to another, and no act of Congress or other competent authority imposes the duty upon the Post Master to distribute letters directed to the same place. A special messenger should be employed in such a case as this, to give personal notice. [Stevenson v. Primrose, 8 Porter, 157; Ireland v. Kipp, 10 John. 490; S. C. 11 ib. 231; Bryden v. Bryden, ib. 187; Taylor v. Bryden, 8 ib. 173; Aymer v. Beers, 7 Cowan, 705; Sirk v. Cunningham, ib. 395; Cuyler v. Wells, 4 Wend. 398.]

PORTER, contra, argued that a jury might properly have inferred that the course of proceeding by the Bank, through its officers, was to ascertain at the return of bills, that notice to charge remote parties was given. The demurrer admits all that a jury can infer. [4 Wheeler's C. L. 340, 342; 1 Hill N. Y. 470; 11 Wheat. 171.] As to the sufficiency of the notice he cited 15 Wend. 364; 4 Wend. 328; 11 John. 231; 2 Ala. Rep. 565; 1 Hill N. Y. 11, 263.

GOLDTHWAITE, J.—1. At first we were strongly inclined to think that the record did not disclose any evidence which could properly warrant a jury in coming to the conclusion that notice of the nonpayment of this bill was sent from New Orleans to Tuscaloosa, but subsequent examination and reflection has satisfied us our first impressions were incorrect.

Upon a demurrer to evidence, the Court does not stand in the place of a jury, to render such a judgment as the jury ought to have done, but to render one against the defendant if the jury, from the evidence, could legally have done so.—[Young v. Foster, 7 Porter, 420.]

We will then examine the case upon the testimony, to see if it would have been unreasonable for the jury to infer the fact of notice from the other facts stated. The protest was proved, or rather it proved itself; a large package of notices of protests of bills protested at the same time was received by the Bank, in due course of mail, and these were handed by the Cashier to the assistant Cashier, who immediately put them in the post office. Both the witnesses state they have no doubt of the fact that one of these notices was for the defendant, and Williams adds that it was directed to him at Tuscaloosa. Neither

had any particular recollection of any notice, as particularly applicable to this bill, but both derived the impression, and their belief was founded *on the course of business in the Bank*. What this course of business was we do not know, nor did the jury, but a question from the plaintiff's counsel to either witness, would probably have elicited the fullest information.

It may be, and it is not improbable, unless we admit the hypothesis, that matters of this importance are most loosely attended to, that the Cashier, or his assistant, on the return of bills, examines the correspondence, to be certain that the necessary steps are taken to charge remote parties. Such a course of business, if pursued, would have furnished sufficient evidence for the presumption that what was usual to be done in all cases, was not omitted in the particular one. This is the usual course of evidence by a large class of persons, such as public officers, notaries and clerks. Where the business performed by them is of great extent, it is highly improbable from the nature of things, that any precise remembrance shall exist of one fact, which has nothing to distinguish it from a multitude of others of the same nature—hence it is that evidence of this general character is admissible.

Indeed the practice, or mode of examination of a witness of this description in Court, is sufficient to show that inferences may be drawn by the jury from the omission of either party to ask of the witness, before the jury, an explanation of a general matter. One illustration will suffice: a Notary states that he has no remembrance or recollection of giving a notice to a named person, but he has no doubt from his general course of business that he did so. It ought not for a moment to be tolerated that the party against whom this evidence is sought to be used, shall omit to inquire of the witness what this course of business is, and then insist that nothing is proven. There could be no jury empanelled that would not render a verdict on such evidence, and their inference would be perfectly legitimate and proper.

In the present case, if a sifting examination had taken place as to the course of business in the Bank, certain results must have flowed from it. It would either have appeared that the mode was so accurate as to produce belief, and leave no doubt, as it seems to have done upon the minds of the witnesses, or

it would have shown such a loose and inaccurate practice, as could have no tendency either to convince them or the jury of any fact respecting the notice.

Upon the entire case then, we conclude, as the jury in all probability would have done, that a notice was sent to the defendant, through the post office at Tuscaloosa.

2. This, however, is insisted not to have been the proper mode to charge him, unless the actual receipt of notice by him was shown, which is not pretended. One of the principal arguments urged to sustain this view is, that the deposit of such a notification in the post office, imposed no duties on the Post Master with respect to it. This assumption is unfounded, because the 36th section of the act of Congress of the 3d March, 1825, provides that "for every letter lodged at any post office not to be carried by post, but to be delivered at the place where it is so lodged, the Post Master shall receive one cent of the person to whom it shall be delivered." In the regulations of the post office these are called box letters. With respect to the general law upon the subject of giving notice through the post office, it is entirely of mercantile origin, and is sufficiently elastic.

In the case of *Stephenson v. Primrose*, [8 Porter, 155,] it was held by this Court, that where the parties all resided in the same city, notice could not be given through the medium of the post office, there being no evidence in that case to show its receipt by the person sought to be charged.

The same principle seems to govern the case of *Ireland v. Kipp*, [10 John 490.] The rule in England seems to be different, at least so far as the city of London is concerned, for there notice sent by the two-penny post is held to be sufficient, whether the parties reside near or at a distance from each other. [Chitty on Bills, 504, and cases there cited; 1 Camp. 246; 9 East 347; 2 Camp. 208, 633.] It is evident that neither the case of *Stephenson v. Primrose* or *Ireland v. Kipp*, warrant the exclusion of the post as a means of giving notice, when the person sought to be charged does not reside in the same town or city with the holder—to require notices in such cases as this, and those similar to it, to be given personally would in all cases involve the expenses of a special messenger. Under the operation of such a rule as is contended for, the

Watkins et al v. Gayle, use, &c.

Bank might, and frequently would, employ more messengers than clerks. We can see no reason for declaring that notice may not be given through the post office, whenever the party sought to be charged does not reside in the same town or city with the holder—in all such cases it is sufficient to show the notice sent by that mode, although it is directed to the person sought to be charged, at the same post office where it is deposited.

Our conclusion is that the judgment on the demurrer is free from error, and it is affirmed.

WATKINS ET AL V. GAYLE, USE, &C.

1. A writ issued against several, which was returned "executed," as to all; after a judgment by default was rendered, the sheriff *mero motu* amended his return, so as to make it appear that the writ was executed on one of the defendants, and returned *non est inventus* as to the others. *Held*, that the erasure of the sheriff's amendment by the Court to which the suit was brought was, under the circumstances, allowable.

WRIT of Error to the County Court of Sumter.

A writ was issued at the suit of the defendant in error against the plaintiffs, founded on a promissory note, and was returned "executed." The plaintiff below declared against all the defendants, and a judgment by default was rendered against them. After judgment, and at the same term, an entry was made as follows: "It appearing to the Court in this case, that the sheriff has, since the judgment, amended his return, so as to change and materially alter said judgment; upon motion of plaintiff's counsel it is ordered by the Court, that the sheriff cannot alter and amend his return so as to disturb the judgment in this case, and that said amended return be erased." The amendment made by the sheriff went to show that the

Watkins et al v. Gayle, use, &c.

writ was executed on Needham Watkins only, and that his co-defendants were not found.

REAVIS, for plaintiff in error. A sheriff may amend his return at any time, according to the truth. [Moreland v. Ruffin, Minor's Rep. 18; Brandon v. Snow & Cunningham, 2 Stew. Rep. 255, Hefflin v. McMinn, 2 Stew. Rep. 492; Philips v. Smith, 1 Str. Rep. 139; see also 11 Mass. Rep. 477.]

The writ being executed on one of the defendants only, it was irregular to take judgment against the others; and the judgment should have been corrected, so as to conform to the sheriff's return, instead of vacating the amendment made by him. [Smith & Howell v. Winthrop, Minor's Rep. 425; see also 3 Stewart's Rep. 134; 9 Porter's Rep. 425; 2 Ala. Rep. 164.]

STEELE & METCALF, for the defendants. The amendment made by the sheriff to his return was properly erased. All the cases cited by the counsel for the plaintiff in error, show that such amendments are allowable only for the purpose of sustaining judgments, or acts done, but never where the effect is to annul judgments, or injuriously affect the rights of others. It is discretionary with Courts either to allow or refuse amendments, and an appellate Court will not revise any decision in regard to them. [9 Porter, 687; 1 Harris & J. 471; 3 Cow. 44; 4 ib. 455; 1 Caine's, 9; 1 John. Cases, 410; 1 Peters 139; 5 Cranch, 15; 6 Taunt. Rep. 19; 2 Peters' Con. Rep. 175, 347; 11 Wheat. 280, 302; 3 Greenleaf, 183, 219; 9 Wheat. 576; 2 S. & Rawle, 29; 1 Binney, 369; 2 Wash. 203; 6 Cranch, 206; 3 Peters, 12; 10 Conn. 400; 13 Mass.; 4 Dev. 492; 4 Conn.; 2 Stew. 492; Minor, 18; 2 Stew. 255; 1 Strange, 139; 11 Mass. 477.]

COLLIER, C. J.—It does not appear that either of the defendants sought to have the sheriff's return corrected, but the amendment was made by him *mero motu*, and without leave of the Court, after a judgment had been rendered in favor of the plaintiff, upon the hypothesis that the return, as indorsed upon the writ, was not according to the truth. Under such circumstances we think the amendment was properly rejected.

By certifying the execution of the process, the sheriff prevented the plaintiff from taking measures to bring in the parties who were not served, induced him to declare against all who were sued, and to take a judgment by default accordingly. The effect of an allowance of the amendment would have been to make the judgment erroneous, and consequently subject to reversal; and, perhaps, as no *alias* writ was sued out previous to the trial term, as to the defendants not served with process, the cause would be discontinued, and in order to bring them in, it would be necessary to submit to a nonsuit and commence anew. Policy, we think, requires that as sheriffs necessarily possess extensive powers, strict rules should be laid down for the direction of their official acts. And where inconvenience as great as that which would result from the mere carelessness or neglect of the officer, in this case, is occasioned, he should abide the consequences. [See Means v. Osgood, 7 Greenl. Rep. 146; Emerson v. Upton, 9 Pick. Rep. 167, and cases there cited.]

An application by an officer to correct his return of process, in general addresses itself to the discretion of the Court, to be allowed or denied according to circumstances. In such case the decision of the primary Court is conclusive, and not subject to revision on error. We have repeatedly held such to be the law, in respect to amendments of the process and pleading, and we cannot conceive a difference in principle between these cases and the present. [See also Mandeville et al v. Wilson, 5 Cranch's Rep. 15; Bailey v. Musgrove, 2 Serg. & R. 29; 3 Phil. Ev. C. & H. ed. 1094, and cases there cited.] Whether if the motion for leave to the officer to amend his return had been submitted by the parties not served with process, its allowance or refusal would have been discretionary with the Court, we will not undertake to determine.

We have only to add that the judgment is affirmed.

LAWSON v. OREAR.

1. By a purchase of land at sheriff's sale, the purchaser is invested with the title of the defendant in execution. If, therefore, the defendant is a tenant, his landlord cannot be permitted to become a co-defendant.
2. The original record of a suit is competent evidence, although an exemplified copy would have been sufficient.
3. Where a *fiery facias* is received by a sheriff, before his term of office expires, and without any action thereon by him, is handed over to his successor, the latter must execute the writ.

Error to the Circuit Court of Talladega.

This was an action of trespass to try title by the defendant against the plaintiff in error.

From a bill of exceptions taken at the trial, it appears that the defendant claimed to be but a tenant of one John Lawson—that John Lawson produced in Court regular title papers showing that at the time of the judgment and up to the present time, he has held the title for the premises sued for, by deed from James Lawson, the original proprietor, and that the defendant was in possession as his tenant, and on this proof moved the Court that he, as landlord of the defendant, be permitted to make himself a party and defend with the said Robert—which motion the Court overruled, and defendant excepted.

The plaintiff read in evidence a deed from the sheriff to him, for the premises in question, in virtue of a levy on an execution from the County Court of Talladega, and sale to him, and produced in Court the Record Books of the County Court, and offered to prove by the Clerk that they were the Record Books of the County Court, and to read therefrom the judgment under which the land was sold, to which the defendant objected, but the Court permitted the proof to be made, and the evidence to go to the jury.

The plaintiff then offered to read in evidence a writ of *fiery facias*, which issued on said judgment, on which were the following indorsements: "Rec'd in office 23d February, 1839—

William Blythe, sheriff." "Rec'd in office 6th March, 1839—D. A. Griffin, sheriff—and levied 4th April, 1839, on the following property," &c., describing the premises sued for—then follows a return of advertisement of the sale, notice to the defendant, and sale to the plaintiff.

It was proved that D. A. Griffin was sheriff of Talladega county from and after the — day of March, 1839, at which time the term of office of William Blythe, late sheriff, expired.

The defendant objected to the reading of the execution and the indorsement of levy and sale, on the ground that the execution having been in the hands of Blythe, late sheriff, officially, should have been by him returned, and that it conferred no authority upon Griffin, his successor, but the Court overruled the objection, and permitted the evidence to go to the jury. Verdict being rendered for the plaintiff, the defendant's counsel moved in arrest of judgment, on the following grounds:

1. Because the original papers and record of the County Court were read in evidence.

2. In permitting the *fi. fa.* and levy, and sale under it, to be read to the jury—which motion the Court overruled. The defendant prosecutes this writ of error, and for cause of error assigns the matters contained in the bill of exceptions.

McCLUNG, for plaintiff in error submitted the cause.

CHILTON, for defendant in error, cited 1 Ala. Rep. 359, 540; 13 Johns. 97; 1 Philips on Ev. 383; 1 Stra. 210; 2 Gilbert's Ev. 8; 2 Porter's Rep. 480.

ORMOND, J.—As a general rule, a defendant in ejectment may set up an outstanding title in another, and the landlord may be permitted to defend as a co-defendant, but by a purchase at sheriff's sale, the purchaser acquires such title only as the defendant in execution had in the premises—if he was a tenant, the purchaser will be a tenant also; and in a suit by the landlord against him, will not be permitted to dispute his title. The reason of the rule, therefore, ceases, in such a case. [See *Avent v. Read*, 2 Porter, 480, where the law was thus held.]

McRae, Adm'r. v. Pegues, Adm'r.

The rule that the best evidence must be produced, has been relaxed in the case of Records, from the necessity of the case, and secondary evidence, by an exemplified copy, admitted. But it would be strange if in cases where the original can be produced, it should be rejected because the inferior evidence of the fact was not offered. It cannot admit of doubt that the evidence was properly admitted, although an exemplification of the record would also have been competent testimony.

The execution upon which the lands in this case were sold, came to the hands of the late sheriff a short time before the expiration of his term of office, and without any action thereon by him, was handed over to his successor, who proceeded to levy and sell. This proceeding was strictly correct. The old sheriff not having acted upon the writ had no power to proceed thereon after the expiration of his term of office, and the duty devolved on his successor, to whom, as the executive officer of the law, it was addressed. This precise question was determined by this Court in the case of *Bondurant et als v. Buford*, [1 Ala. Rep. 360.]

There is no error in the judgment of the Court, and it is therefore affirmed.

McRAE, ADM'R. v. PEGUES, ADM'R.

1. The defendant in error cannot object to a reversal on the ground that the interest of the plaintiff in the matter of litigation was not propounded in the Court below. In cases where distribution is sought in the Orphans' Court, it is the correct practice for the plaintiff to set out his right to distribution; if he neglects to do so, the administrator may compel him to do it by filing an exception; but if this is omitted, he cannot afterwards, on error, question the right.
2. Proof by the grantee of a deed that he deposited it in a post office, directed to another, at a different office, and this person deposes that he never received it—afterwards application is made personally to both the post offices, and also to the General Post Office by letter, and the deed is not found, this is sufficient to let in secondary evidence.

McRae, Adm'r. v. Pegues, Adm'r.

3. Parol evidence of the contents of a deed is improper, when it is shown that the party offering it is in possession of a true copy.
4. A voluntary deed, if delivered to the donee, will pass the title to slaves, as between the donor and his representatives, although not proved or acknowledged, as required by the statute of frauds.
5. A deed of gift, if delivered to the donee, will pass the title to slaves as effectually as if the slaves themselves were delivered.

WRIT of Error to the County Court of Macon.

The proceedings in this case are so defective as not to show with certainty, the right of the plaintiff to institute the inquiry upon which the judgment of the Court below was given. It may be inferred, however, from the caption of the case, that he claims as administrator of the estate of Elmira Outlaw, who was the widow of B. N. Pegues, deceased, and as such entitled to a distributive share of his estate. The suit grows out of a suggestion that certain slaves came to the possession of the defendant, as administrator of B. N. Pegues, belonging to his estate, which have not been distributed or accounted for by the defendant.

The defendant, in his answer to the plaintiff's suggestion, contends that these slaves were given to divers persons, by a deed of gift executed by his intestate in his lifetime, and that by virtue of it, the donees, at his death, took possession of the slaves.

The issue formed between the parties on this suggestion and answer, was tried by a jury, which returned a verdict for the defendant, upon which judgment was given in his favor.

At the trial the defendant introduced one Rainer as a witness to prove the execution of the deed, a copy of which is exhibited in the pleadings. This witness testified that he saw a deed executed by B. N. Pegues, in the spring of 1836, to Wade H. Greening and others, and to which he was a subscribing witness; this deed was delivered to John S. Greening, one of the grantees.

This witness stated that the deed was acknowledged before him, as a Justice of the Peace, but did not state there was any other witness to the deed.

John S. Greening was then called to prove the loss of the deed; and he testified the deed was delivered to him by B. N.

McRae, Adm'r. v. Pegues, Adm'r.

Pegues, and by the witness deposited in the post office, at Cambridge, Dallas county, directed to the Clerk of the County Court of Dallas county, at Cahawba. The witness had forgot whether he paid the postage or not, but he had not paid the Clerk to record the deed. Subsequently he called at the Clerk's office and made inquiry for the deed, when he was informed by the Clerk that it had not been received by him. Witness then called at the post office at Cambridge, and was informed the deed was not there. Some eighteen months or two years afterwards he wrote to the Post Office Department, making inquiry as to the deed, and was then informed it was not to be found among the dead letters in the Department. James D. Craig then testified that he had been Clerk of the County Court of Dallas county from 1828 to 1840, and had never received a letter from John S. Greening containing the deed referred to. That when Greening applied to him for the deed, he applied to the post office at Cahawba, but could hear nothing about it, nor has he ever been able to find it. On this evidence the defendant was permitted to prove the contents of the deed, although opposed by the plaintiff. The deed exhibited in the pleadings is as follows :

"Know all men by these presents, that I, Badaegood N. Pegues, of the county and State aforesaid, for and in consideration of the natural love and affection I have and entertain for Wade H. Greening, the legal heir of Eldridge S. Greening, late deceased, Rufus W. Greening, John S. Greening, John S. Pegues, in right of his wife Elizabeth, formerly Elizabeth Greening, Thomas T. Guy, in right of his wife Mary W. Guy, formerly Mary W. Greening, and William G. Cato, in right of his wife Beatrix S. Cato, formerly Greening, brothers and sisters of my late wife, Amanda P. Pegues, formerly Amanda P. Greening, and for and in consideration of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, have given and granted, and by these presents do give, grant and confirm unto the said Wade H. Greening, (and the other grantees, again naming them,) their heirs and assigns forever, the following negro slaves, (which said slaves are to remain in my possession during my natural life, or until I may endeavor to remove them out of the State,) and then to descend to the said Wade H. Greening, (here the grantees are again

McRae, Adm'r. v. Pegues, Adm'r.

named,) and their heirs, viz: one negro man slave called Ben, two negro boy slaves named Major and General, and a negro girl slave called Lucy, together with her increase. And I do hereby bind myself, my heirs, executors, administrators and assigns, to warrant and forever defend the title to the above described slaves, to the said Wade H. Greening, (here the grantees are again named,) their heirs and assigns forever, free from the claims of each and every person.

In witness whereof I have hereunto set my hand and seal, this — day of ———, eighteen hundred and thirty.

B. N. PEGUES, (*seal.*)

Signed, sealed and delivered in presence of—

Acknowledged before Thomas G. Rainer, a Justice of the Peace.

The plaintiff then requested the Court to charge the jury—

1. That delivery is essential to the validity of a gift of personal property, and without such delivery the title does not pass. The delivery must also be according to the nature of the thing given.

2. That actual delivery of possession is an essential ingredient in a gift of personal property, and a gift only becomes perfect by an actual delivery and acceptance.

3. That when gifts of personal property are made by deed, the deed must be proved and recorded within twelve months after the execution thereof, unless possession really and *bona fide* remain with the donee.

These charges were severally refused, and instructions given that if the gift was made by deed, the delivery of the deed transferred the right to the property, and would be valid between the parties and their representatives, without an actual delivery of the property; and if the deed contained a stipulation that the possession of the property should remain with the donor during his lifetime, the possession so remaining is consistent with the deed, and a delivery of the property was not necessary to vest a good title in the donees.

The plaintiff excepted to the charge given, as well as the refusal to give those requested, and also to the admission of secondary evidence of the deed. The action of the Court on these several matters is assigned as error.

McRae, Adm'r. v. Pegues, Adm'r.

CRABB, for the plaintiff in error, insisted that the *original deed* ought to have been proved to have been duly executed, before secondary evidence of its contents could be legally admitted. [1 Phil. Ev. 452.] This course was not pursued, nor was the deed itself so executed as to render it valid. The statute requires such a deed to be acknowledged or proved in Court. [Digest, 207; 1 Ala. Rep. 52; 2 ib. 117, 648.]

The loss of the original deed ought to have been clearly shown, and a *diligent and thorough search* made for it. The loss being established, a *copy* of the deed, if in existence, as it was in this case, ought to have been introduced instead of parol evidence of the contents. [1 Phil. Ev. 437; Riggs v. Taylor, 9 Wheat. 485.]

But no evidence could warrant the admission of this deed to the jury. It is a *nude pact*, and the consideration expressed is neither good nor valuable. Independent of this, it is void for the want of the prerequisites enumerated by the statute of frauds. [Digest, 207.]

In refusing to give the charges requested, as well as on that given, the Court erred in the face of the common law, statute law, and the decisions of this Court.

BROWN, *contra*, relied on the case of Swift v. Fitzhugh, [9 Porter, 40,] to show that the preliminary proof of the loss of the deed was sufficient.

As to the validity of the deed to operate as a gift, and thus pass the title to the donees, he cited Thomas v. Soper, 5 Munf. 28; Banks v. Marksbury, 3 Littel, 278; McCutchen v. McCutchen, 9 Porter, 650.

As to the possession remaining with the donor, it cannot be disputed by a volunteer, but here it is consistent with the deed. [Edwards v. Harbin, 2 Term. 587; 3 ib. 620.]

He argued that the statute of frauds does not avoid either fraudulent or voluntary conveyances, unless at the instance of a creditor or *bona fide* purchaser. [Sewall v. Gliddon, 1 Ala. Rep. N. S. 52; Lund v. Jeffries, 5 Rand. 211; Shirley v. Long, 6 ib. 764; Lucy v. Wilson, 4 Munf. 313; Lightfoot v. Colgin, 5 ib. 71; Goodwin v. Morgan, 1 Stew.; Rochelle v. Harrison, 9 Porter, 352.]

But should there be error, the present plaintiff has propound-

McRae, Adm'r. v. Peguer, Adm'r.

ed no interest upon the record, so that it is impossible to determine the error can injuriously affect him, as his interest is entirely a matter of conjecture. The rule of this Court is that the plaintiff must show that his rights have been injuriously affected. [Duffey v. Pennington, 1 Ala. Rep. N. S. 506; Hilman v. Gayle, *ib.* 517; Stone v. Stone, *ib.* 582.]

GOLDTHWAITE, J.—1. The defendant objects that no reversal of this judgment can be had, even after it may be ascertained to involve material errors, because the plaintiff in the Court below has omitted to set out his interest to litigate any questions with the defendant. This defect cannot, in our opinion, avail the defendant, because it was his duty, as it clearly was his right, to require the other party to show by what right he claimed to call for a distribution. The practice in the Ecclesiastical and Admiralty Courts, is for the party claiming a right to litigate to propound his interest, and such, strictly speaking, is the proper course in our Orphans Courts, but it is now perhaps too late to insist on the application of rigid rules to such proceedings; not that they would be otherwise than beneficial, but because the laxity of practice has become so general and so inveterate, that much expense, and possibly injury, would arise by the delay of judgments on mere technical grounds. All that can now be done without express legislation, is so to mould the practice, that the rights of all may be preserved.

We apprehend the cases are very few and rare that questions of the sort raised on this record are ever litigated by those who have no interest in them—and therefore all that justice demands is, that the other party may be permitted to require the person who seeks to litigate such or similar matters, to propound his interest. This if not shown in the first instance, upon the application to the Court can always be called out by a precise exception. When the interest is propounded it can either be admitted or controverted as any other allegation, but it never can form any part of the inquiry, when an issue is made up upon the merits.

2. The question which is made as to the sufficiency of the preliminary proof of the loss of the original deed, in order to let in either parol proof of its contents, or a copy, was deter-

McRae, Adm'r. v. Pegues, Adm'r.

mined by this Court, in *Mordeca v. Beal*, [8 Porter, 529,] and again in *Swift v. Fitzhugh*, [9 Porter, 39.] In both these cases, as in this, the utmost possible diligence to trace the paper was not shown, but a reasonable presumption of its loss was afforded, and every presumption rebutted that it was withheld from the jury. The party who had the custody of the deed, placed it in the post office addressed to another person, and this last deposes that it was never received by him. Subsequent application is made personally to both post offices, and by letter at the General Post Office, but at none of these places can it be found. We cannot conceive a clearer case for the admission of secondary evidence.

3. Doubtless it would be irregular to give parol evidence of the contents of a deed, if the party was shown to have knowledge of a true copy; but nothing of that kind is shown by the evidence—the witness was permitted to give evidence of its contents—whether these contents were proved by the exhibition of a copy, or whether the witness spoke from his recollection of the deed, does not appear. The former, however, is much more probable than the latter; and it was the duty of the plaintiff to render this matter entirely clear, by questioning the witness, if he desired, upon it, to raise an exception. [*Carson v. The State Bank*, [June Term, 1842, p. 148.]

4. It is said that no preliminary evidence could authorize the admission of the contents of this deed, because it was inoperative and void. This is a question not made at the trial of the cause, and therefore could not now be properly raised—but as it is somewhat involved in the charge given by the Court, we shall proceed to consider it.

The enacting clause of our statute of frauds declares, “that every gift, grant or conveyance of lands, tenements or hereditaments, goods or chattels, or any rent, common or profit, out of the same by writing or otherwise; and every bond, suit, judgment or execution, had, made or contrived of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, &c., or to deceive those *who shall purchase*, &c., shall be from henceforth deemed and taken *only as against the person or persons*, &c., whose debts, &c., by such guileful and covinous devises and practices as aforesaid, shall, or might be, in any

McRae, Adm'r. v. Pegues, Adm'r.

way disturbed, &c., to be clearly and utterly void." It then proceeds further to declare, that if any conveyance be of goods and chattels, it shall be fraudulent, *within this act*, unless recorded, &c.

Under the terms of this statute it is difficult to conceive how any doubt could ever have been entertained that the deed was good as between the parties, though never recorded. The object of this statute is to protect creditors and subsequent purchasers, whether with or without notice. [Myers v. Peak, adm'r, 2 Ala. Rep. 640; Oden v. Stubblefield, *ib.* 684.] As to these two classes of persons—deeds not acknowledged or proved in the manner required are void—but are so *only* as to them. It seems to us impossible to give any construction to this statute, without departing from its clear intention, which will avoid a voluntary deed, except at the instance of a creditor or subsequent purchaser.

Our statute is almost a copy from that of Virginia, and the same construction has there been given. [Lund v. Jeffries, 5 Rand. 211; see also Lightfoot v. Colgin, 5 Munf. 42.]

5. The request of the plaintiff for the specific charges which were refused, seems to be predicated upon the idea that delivery is as essential to the gift of a personal chattel, when the title is conveyed by deed, as it certainly is when the gift is evidenced by parol merely. The instructions given assume, that when the gift is by deed, the delivery of the deed is equivalent to the delivery of the chattel.

In our opinion the Court was correct in its exposition of the law, and we need only to refer to the case of McCutchen v. McCutchen, [9 Porter, 650,] in which this question arose, and was determined in accordance with the views now expressed.

Upon a review of the whole case, we can perceive no error, and therefore the judgment is affirmed.

Johnson, Adm'r, et al v. Neil and Wife.

JOHNSON, ADM'R. ET AL V. NEIL AND WIFE.

1. The statute in respect to the manner of obtaining and assigning dower, is cumulative, and does not exclude all other modes; and an assignment of dower, though irregularly made, to which the wife has given her assent, is obligatory upon her; especially if she takes possession of the land allotted to her, and there is no evidence that she has been overreached by fraud.
2. As the widow holds her dower from her deceased husband, or rather by appointment of law, it is not indispensable to the validity of its assignment that it should be made by deed or instrument in writing.

THE defendants in error, in February, 1841, filed their petition in the County Court of Dallas, setting forth that the wife of the petitioner, Mathew Neil, was late the widow and relict of James Johnson, who had there died intestate—that the administration of his estate was committed to Wm. Johnson, by the Orphans Court—and that the intestate died seized and possessed, in fee simple, of the west half of the south west quarter of section ten, township sixteen, and range eight, situate in the county of Dallas.

The petition further states, that the intestate left but two children, viz: Eliza Jane, now the wife of Robert Moore, and James S. a minor, of whom Bernard Johnson is guardian, all of whom reside in the county of Dallas. It also alleges that the relict of the intestate has never relinquished her right to the land described; and the petitioner therefore prays that dower may be allotted to her in the same.

The defendants pleaded separately, but all insisted that the widow of James Johnson had been already endowed of the lands mentioned in the petition, and still retains the possession thereof—that on the — day of —, all the lands belonging to the estate of the intestate, were, by order of the Orphans Court of Dallas, and in due form of law, divided between his heirs, and the land mentioned in the petition was allotted to James Johnson, the infant heir, who has the possession thereof—and that that division and the proceedings thereon are legal and have been approved by the Orphans Court.

The Court was of opinion that the dower had not been le-

Johnson, Adm'r, et al v. Neil and Wife.

gally allotted in the lands described in the petition, and awarded a writ in pursuance of the statute, requiring the sheriff to cause the allotment of dower to be made. This writ was executed, and the admeasurement made by the commissioners approved by the Court.

On the trial the defendants excepted to the ruling of the presiding Judge. From the bill of exceptions, among other things, it appears that the land in dispute had been divided as alleged in the plea, before the filing of the petition, and that division confirmed. It was also shown to the satisfaction of the Court, that Mrs. Neil, during her widowhood, filed her petition against the administrator of her former husband, praying an allotment of dower in the lands of which he died seized—that a writ issued, and dower was assigned her in the lands described in that petition. Although the land described in the petition now filed, was not then mentioned either in the petition or writ of dower, yet the commissioners who acted did go upon the land, and with the approbation and consent of Mrs. Neil, did allot her dower of the same, by increasing the assignment made to her from other lands, to the extent of one third the value of the land in controversy. It was further shown that Mrs. Neil, during her widowhood, went into the possession of the lands thus allotted her, and still retains the same—and that all the proceedings in relation thereto having been confirmed, are still in full force. The return of the commissioners who acted under Mrs. Neil's petition did not refer to the land in question, but the facts stated were all proved to the satisfaction of the Judge of the County Court.

J. B. CLARKE, for the plaintiff in error, contended that the County Court erred in ordering a further allotment of dower to Mrs. Neil upon the petition of herself and husband; that the assignment previously made to her, during widowhood, was ample, and so received. He cited Pirtle's Dig. 278, §29; Park on Dower, 252-4, 263-4-7-9, 293, 340; 2 Cowen's Rep. 638; Conant v. Little, 1 Pick. Rep. 189; Shattuck v. Gragg, 23 Pick. Rep. 92.

G. W. GAYLE, for the defendant.

Johnson, Adm'r, et al v. Neil and Wife.

COLLIER, C. J.—The County Court doubtless determined in favor of Mrs. Neil's right to dower in the half quarter section of land, in which the petitioners sought it, and against the bar set up by the defendants, on the ground that this land was not particularly described in the petition previously filed by her. The statute certainly requires that the petition of the widow for dower shall set forth the nature of her claim, and specify the lands, tenements and hereditaments of which she seeks to be endowed. [Aik. Dig. 133, §5.] But the statute is cumulative, and does not exclude all other modes of assigning dower; and it has consequently been holden that the heir may endow the widow—and that her assent verbally given to an assignment, though irregularly made, is obligatory upon her. Thus in *Moore and wife v. Waller*, [2 Rand. Rep. 421.] it was held that the heir had the power at common law to assign dower without resorting to any Court; and that that power was not impaired in Virginia by the act of Assembly; and that the assignment of dower by an adult heir in behalf of himself and his co-heirs, who are infants, is as binding on them as it is on him, provided the assignment is not excessive. [See also *Sutton v. Burrows*, 2 *Murphy's Rep.* 81.] As to the power of a guardian in this respect, see *Park on Dower*, 266; *Jones et ux v. Brewer*, 1 *Pick. Rep.* 314.

It is not indispensable to an assignment of dower, that it should be made by deed or instrument in writing. And in *Conant v. Little*, [1 *Pick. Rep.* 191,] it is considered that the statute of frauds did not change the law in this respect. The Court say, "If an assignment was a conveyance from the heir to the widow, without doubt since the statute a deed or writing would be necessary; but it is not a conveyance—the widow holding her estate by law, and not by contract, wants nothing but to have that part which she is to enjoy set out and distinguished from the rest, and this may be done by setting out by metes and bounds as well as by deed. The widow does not hold her estate of the heir, but of her deceased husband, or rather by appointment of law. If she received land that was not her husband's, or other thing in lieu of dower, a deed would be necessary, because she would derive her title from the person making such conveyance in lieu of dower."—

[Shattuck v. Gragg, 23 Pick. Rep. 92; Park on Dower, 269, 340.]

Where the widow assents by parol to an assignment of dower, and takes possession of the land, she cannot afterwards be heard to alledge that the proceedings were not in conformity to law—unless, perhaps, she could show that she had been overreached and induced by fraud to give her assent to the assignment. This principle is more especially applicable where the other lands of which the deceased husband was seized have been divided among the heirs, or otherwise legally disposed of.

In the case at bar, Mrs. Neil assented to the allotment of dower which was made to her, at a time when she was capable of binding herself; the lands set apart to her are equal to one third of the entire realty of which she was entitled to be endowed; the residue of the estate of her deceased husband has been divided with the approbation of the Orphans Court among his heirs.

Under these circumstances she has no claim in law to an increased assignment of dower—and the order which determined otherwise is consequently reversed.

BOLLING & JAMES v. LOGAN.

1. Where there are two defendants and one pleads usury, the other defendant cannot be compelled, against his will, to be examined as a witness, under the statute to prove the usury.

ERROR to Sumter County Court.

Assumpsit on promissory note by the defendant in error against the plaintiffs in error.

Upon the trial the defendant, James, having pleaded usury, offered his co-defendant, Bolling, as a witness to prove the note

Stinson v. Gosset.

usurious, and Bolling having declined to give testimony, the Court held that he could not be compelled to be a witness, to which decision of the Court the defendant, James, excepted, and now assigns for error.

HAIR, for plaintiff in error.

BOYD, contra.

ORMOND, J.—The act to suppress usury [Aik. Dig. 437, §5,] provides that the borrower, or party to the usurious contract from whom usury is taken, shall be a good and sufficient witness to establish that fact unless the person against whom such evidence is offered to be given will deny upon oath, in open Court, the truth of what such witness offers to swear against him.

The permission thus given to the defendant is a personal privilege which he may exercise or not, at his election. It appears that Bolling did not desire to interpose the defence pleaded by his co-defendant, and declined to give testimony, and we feel very clear in the opinion that he could not be compelled to do so.

Let the judgment be affirmed.

STINSON v. GOSSET.

1. In an action for an unlawful detainer the plaintiff is not a competent witness to prove the service of the notice in writing for the delivery of possession of the premises sought to be recovered.
2. An action for an unlawful detainer, under the statute, cannot be maintained unless the defendant entered as a tenant of the estate, or is in possession of the same by, from, under or by collusion with such tenant—but it need not be shown that the tenancy was created by the plaintiff, if he is entitled to the possession as a remainder man, or as owner of the reversion.

ACTION for an unlawful detainer, commenced before a Justice of the Peace, who gave judgment of restitution in favor of the plaintiff, after which the suit was removed to the Circuit

Court, by *certiorari*, where the judgment was reversed and the cause remanded to the Justice, with instructions to award a *venire de novo*.

The complaint contains one count only, which is for an unlawful detainer.

In the course of the trial the plaintiff proposed to prove by his own oath, that he served a notice in writing on the defendant, to deliver up the possession of the premises sued for. He was permitted to give evidence of the fact, and the defendant excepted. The evidence set out in the record does not show how the plaintiff claimed to be entitled to the possession of the premises, but a lease is set out on which the defendant appears to have been the tenant of one Isaac Sorwell. One of the charges requested by the defendant was, if the proof showed that the relation of landlord and tenant, or of lessor and lessee did not exist, and that the defendant was not in possession by, from, under, nor by collusion with a tenant of the plaintiff, the suit could not be maintained. This was refused and the defendant excepted. Several other charges were refused, but as they are not considered in the opinion of the Court, they are not now set out.

MOORE, for the plaintiff in error, submitted the case without argument.

GOLDTHWAITE, J.—There is a large class of cases in which parties are permitted to be sworn, but the relaxation of the general rule does not seem to have been extended beyond the proof of circumstances necessary to authorize the admission of secondary evidence. The loss of an original paper, or the service of notice to take depositions are illustrations of the class. [Cowan and Hill's notes, 2 Phil. Ev. 138.] In the present case the defendant's guilt by the statute is made to depend upon the fact of holding over after a written notice to deliver the possession—consequently there is no ground to suppose that the proof of notice is similar to that required to be given when a deposition is taken.

The statute says, if any tenant, &c. shall wilfully and without force hold over, &c. after demand and notice, in writing &c., such persons shall be guilty of an unlawful detainer. The guilt consists then entirely in holding over after a demand and notice

in writing, and being the essence of the offence, it cannot be proved by the adverse party. It was erroneous therefore to permit the plaintiff to give evidence by his own oath of the fact of notice.

2. Our statute with respect to forcible entry and detainer, seems to contemplate three distinct separate offences, all of a kindred nature.

The first is a forcible entry; the second an entry without force, but holding the possession by force, by menaces, or by exciting fear of danger; the third is a lawful or peaceable entry, but the possession is kept unlawfully and with force, menaces, &c.—and this last is called a forcible detainer merely. [Digest, 202, §1, 2, 3.]

The particular offence of which the plaintiff complains, is provided for by a distinct section of the same act, which is in these terms: "If any tenant or tenants, for term of life or lives, year or years, or other person or persons, who are or shall be in possession of any lands, tenements or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall wilfully and without force, hold over any lands, &c. after demand and notice in writing, given for the delivery of the possession thereof, by his, her, or their landlord, lessor or lessors, or the person or persons to whom the remainder or reversion of such lands, &c. shall belong, his, her or their agent, &c. thereunto lawfully authorized, then such person or persons so holding over, shall be guilty of an unlawful detainer." [Ib. 203, §5.]

This is the only part of the statute which defines the offence described in the complaint, and it is evident it cannot exist unless the defendant is a tenant, holding over, or is in possession under or by collusion with such a tenant.

In all other cases arising under the act, the aggressor is guilty of either a forcible entry, a forcible entry and detainer, or of a forcible detainer merely. The defendant then, very properly insisted that it was necessary to show that he occupied the possession in the manner described by the statute; but in the charge requested, he seems to have considered that the plaintiff of necessity should have been his landlord, a matter which is excluded by the very terms of the act, which gives the remedy equally to the remainder man or the owner of the

reversion. In this view the magistrate 'correctly' refused the charge, for it may be that there was evidence to show that the complainant was the owner of the reversion.

Without examining all of the matters presented on the record, we are satisfied that the Justice of the Peace erred in admitting the plaintiff to give evidence, and consequently the judgment of the Circuit Court reversing the case, is free from error, and is affirmed.

LORE v. THE STATE.

1. The expiration of the term of a Court operates *ipso facto* to discharge a jury who are deliberating upon the case of one indicted for a capital offence, and the recital of the facts on the record cannot prevent a second trial; nor will errors of law in empannelling the first jury, entitle the prisoner to his discharge from the prosecution.
2. Where, after the commission of a crime, the law in respect to grand and petit jurors is modified by the legislature, and the State and accused are each entitled to a greater number of challenges, the trial will be had accordingly to the new law.
3. The first *proviso* of the last section of the act of the 9th January, 1841, "regulating punishments under the penitentiary system," means this, viz: that they who had committed offences previous to the time when the statute became operative, may be proceeded against, and if found guilty shall receive the punishment then imposed by law, notwithstanding its subsequent modification. The second *proviso* is merely affirmative of what the law would be without it; and the exception in that proviso, though badly expressed, was intended to prevent it from so operating as to annul to any extent the act itself.

THE plaintiff in error was indicted at the March term, 1841, of the Circuit Court of Barbour, for the murder of Henry Blake—being arraigned he pleaded "not guilty," and was put upon his trial, but the jury not agreeing in their verdict, and the term of the Court having expired, a mis-trial was ordered by the presiding Judge, and the cause continued. In the organization of the jury several questions of law arose, which

were spread upon the record, and an order made for their reference to this Court, as novel and difficult.

These questions may be thus stated :

1. One juror had formed and expressed an opinion as to the guilt of the prisoner from information derived from a credible man, who heard the examination before the committing magistrate, yet, notwithstanding the juror was objected to for cause, he was put upon the prisoner, who was forced to challenge him peremptorily.

2. Several other jurors, who respectively stated that they had formed and expressed an opinion as to the guilt of the prisoner upon rumor, were sworn, without his being permitted to ask them whether their opinion was not founded upon what they had heard from credible persons, whose information was derived from the witnesses.

After the mis-trial, and at the next term, upon affidavit of the prisoner, the venue was changed to the county of Henry, and at the term of the Circuit Court holden in that county, in April, 1842, the prisoner was tried, found guilty of murder, and sentenced to be executed. On this last trial, the Court referred the questions of law reserved upon the first, and in addition thereto, several others. Without stating the reference *in extenso*, (as the Court does not consider all the points,) it appears that the prisoner was served with a list of but thirty-six jurors, who were to pass upon his trial, though he insisted upon his right to be furnished with a panel of fifty ; and after having challenged peremptorily sixteen jurors he proposed to challenge another, without cause, but the right was denied him.

The prisoner's counsel, supposing that the order of reference did not bring up all the questions which he wished to be re-examined, applied for and obtained a writ of error in vacation, returnable to this term—and the cause is now considered upon the points referred, as well as the writ of error.

PECK & CLARK, for the plaintiff in error.

ATTORNEY GENERAL, for the State.

COLLIER, C. J.—A juror who has formed and expressed an opinion as to the guilt of an individual charged with the

commission of a capital offence, upon information derived from those who were witnesses, or from having heard the examination before the committing magistrate, is certainly an incompetent trior, and should be set aside by the Court, *mero motu*. The cases of the State v. Quesenberry, [3 S. and P. Rep. 308,] and Ned v. The State, [7 Porter's Rep. 187,] are so direct and explicit on this point as not to allow it to be controverted. Upon the attempt to try the prisoner in Barbour, the law was supposed to be otherwise, and the question is, can he now avail himself of an error then committed.

The mis-trial was certainly regular, and within the competency of the Circuit Court. The expiration of the term operated *ipso facto* to discharge the jury, [Ned v. The State,] and causing that to be stated of record which the law itself effected, cannot be permitted to discharge the prisoner. But it is insisted that the errors committed by the Court in empannelling the jury, are irreparable, that they probably caused the trial to be abortive, and as the prisoner cannot be again placed in the condition he then occupied, the second trial was unauthorized. This argument cannot be maintained. If it were well founded, it would be difficult to conceive of any case in which the conviction was reversed for error in the organization of the jury, the admission of evidence, or a charge upon the law, where the prisoner could be tried again; for in neither of these cases could his case be placed before the same jury precisely as it had been.

The case of Ned v. The State, does not lay down the law thus broadly. There the prisoner's case was withdrawn from a jury of his own selection without any assent on his part—here the prisoner was put upon his trial before a jury illegally constituted; there the prisoner's life was actually in jeopardy—here it never was, inasmuch as a judgment of guilty would have been erroneous and reversible.

The State v. Hughes, [2 Ala. Rep. 102,] is a much stronger case in favor of the prisoner's discharge than the present.—There the verdict was received by the Court, in the absence of the prisoner, so that he was denied the privilege of polling the jury; the judgment was reversed and a trial *de novo* awarded, the Court remarking that he could not occupy a position more favorable than he would if the right of polling had been ex-

pressly denied. But it is needless to multiply citations to this point, for the cases referred to are entirely pertinent.

The prisoner's right to be furnished with a panel of fifty jurors, and to challenge peremptorily more than sixteen depends upon the construction of the last section of the act of the 9th January, 1841, "regulating punishments under the penitentiary system." That section enacts, "that it shall be the duty of the commissioners of the penitentiary to report to the Governor of the State of Alabama, when the penitentiary building shall be ready for convicts, and that thereupon proclamation be made by the Governor of that fact; and that from and after the date of said proclamation this act shall be in full force and effect: *Provided*, That offences committed prior to the date of the said proclamation, be proceeded against and punished as theretofore: *And provided further*, That all laws and parts of laws coming in conflict with the provisions of this act, be and the same are hereby repealed, except as to any crime or punishment enumerated or provided for in this bill: *Provided*, the Governor shall not issue his proclamation before the first day of October next.

There can be no doubt that this enactment was inoperative until the proclamation of the Executive was issued, but the question is, how far do pre-existing laws continue in force as to offences previously committed? Do they only determine the measure of punishment to be inflicted, or do they ascertain the manner of proceeding and trial also? The first *proviso* was doubtless introduced to prevent those who had committed offences before the law took effect from escaping punishment, if they were not tried previously, and was not intended to continue, in reference to such cases, all the *minutia* and *formula* relating to the trial, which the old law provided. No valuable purpose would be subserved by such a requisition, and as a change in this respect was within the legitimate sphere of legislation, and was promotive at least of convenience, no reason is conceived why the proceedings preparatory to, and on, the trial, should not be regulated by the law as remodelled.

The 8th section of the 10th chapter of the act modified the law as it respects the drawing and empanneling a grand jury to attend the Circuit Court, and if it does not supersede the previous enactments on the subject, so far as to authorize a

jury thus drawn and empannelled, to find an indictment for an offence committed before the Governor's proclamation issued, then the anomaly may be presented of requiring two grand-juries, differently constituted, to attend the same Court. A statute leading to such a result should be very explicit, if not imperative in its terms. We cannot avoid the unfitness and inconvenience of the thing by supposing that the legislature intended that an indictment in such case should be found by a grand jury organized under the new law, but all subsequent proceedings should conform to the old. There is nothing in the *proviso* to indicate such an intention; and if such an indictment would be valid, then is the accused entitled to be tried according to the forms which have been last prescribed. The first *proviso* amounts in effect to nothing more than this, that they who have committed offences previous to the time when the statute becomes operative, may be proceeded against, and if found guilty shall receive the punishment which the law then awarded, notwithstanding its subsequent modification.

From this view it follows, that the prisoner was entitled to a list of at least fifty persons, from whom the jury who were to try him should be selected, and was authorized to make at least twenty-one peremptory challenges, as provided by the 53-4-5 sections of the 10th chapter of the act in question; and that the denial of these rights is fatal to the conviction.

It is further argued, that the second *proviso* of the section quoted is inconsistent with itself, and in legal effect nullifies the first, and this being the case the prisoner should be discharged. This entire section was materially changed by the legislature, after the draft of the statute was submitted to them by the commissioners, and the *proviso* is not expressed with so much clearness as could be desired, yet it is believed that the want of precision will not lead to the consequences which the prisoner's counsel contends should follow.

"The declaration "that all laws and parts of laws coming in conflict with the provisions of this act be and the same are hereby repealed," was wholly unnecessary, for such would have been the tacit effect of the statute, viz: a repeal by implication of all pre-existing enactments which were not in harmony with it. The exception in the *proviso* was merely affirmative of what would have been the law independently of it,

 Beatty v. Holloway.

though avowedly intended to prevent the repealing clause from so operating as to annul to any extent the act itself. In fact the entire *proviso* was unnecessary, and doubtless introduced *ex majore cautela*.

Other questions are raised upon the record, but they relate to irregularities on the trial, and will not in all probability arise again—we therefore, without considering them, have only to add, that the judgment of the Circuit Court of Henry is reversed, and the prisoner directed to remain in custody until he is tried, or discharged by due course of law.

BEATTY v. HOLLOWAY.

1. To an action of trespass against a sheriff, he justified under a *fiery facias*. To this plea the plaintiff replied generally. Held—that under this issue it was not competent for the plaintiff to prove that the goods taken were exempt from execution, but that to admit the proof the plaintiff should have replied these facts by way of confession and avoidance.

ERROR to Dallas Circuit Court.

Trespass *vi et armis* by the plaintiff in error against the defendant in error, sheriff of Dallas county.

The declaration charges the taking and carrying away various articles of household furniture and wearing apparel.

The defendant cravedoyer of the writ, and pleaded in abatement of the suit; to this plea there was a demurrer of which no notice appears to have been taken.

The cause was tried on the pleas of not guilty, and a special plea of justification, to which a general replication was made.

On the trial it appeared from the testimony that the defendant had taken the goods mentioned in the declaration under an execution, as sheriff of the county. Among the articles thus taken, were two beds, and it was proved that the plaintiff had no other beds than those thus taken. The Court charged

that the plaintiff could not show that the goods taken as aforesaid were exempt from execution, unless that fact had been replied specially to the plea of justification, to which the plaintiff excepted.

The defendant had judgment, and the plaintiff prosecutes this writ and assigns for error—

1. The demurrer to the plea in abatement is not disposed of.
2. There is no replication to the pleas.
3. The matter shown by the bill of exceptions.

GEO. GAYLE, for plaintiff in error.

ORMOND, J.—It is the settled rule of this Court not to notice on error the omission to dispose of a demurrer to a plea, when the parties go to trial before a jury; as it will then be considered that the demurrer is waived. [Ledyard v. Manning, 1 Ala. Rep. 153.] The objection that there is no replication to the plea is not sustained by the record, but if true would not be available on error, where, as in this case, the parties appeared and submitted the cause to a jury.

By a statute to be found in Aikin's Digest, 167, §43, it is declared that certain property shall be exempt from execution and retained by and for the use of every family in this State. Among the articles thus reserved from sale by execution are "two beds and furniture," and the sheriff was clearly responsible if under the pleadings in the cause the evidence was admissible.

The plea of the defendant is not set out in the record, but according to the loose practice too prevalent, is pleaded by its title. No objection however can be taken to the plea in this Court, as taking issue upon it must be considered a waiver. The substance of the plea was that the trespass complained of was a levy made of the defendant's goods by virtue of a writ of *fieri facias*. A general replication to this plea is a traverse or denial of the facts alledged in it, and relied upon as a justification. If it had been the intention of the plaintiff not to controvert the facts set up in the plea as a defence to the action, but to insist that notwithstanding the fact relied on was true, the defendant was liable because he had seized goods

Gregg v. Crawford.

which the execution did not warrant his taking, it should have been replied by way of confession and avoidance of the allegations of the plea, and thus tender a new issue to the defendant.

This not being done, the facts offered in evidence were properly excluded, as they had no connection whatever with the issue which the parties had submitted to the jury. [Stephens on Pleading, 57.]

Let the judgment be affirmed.

GREGG v. CRAWFORD.

1. The Marshal of the United States is not liable to a surety for omitting to levy on the property of his principal, or for making a false return of no property, although by the omission to levy the surety is eventually compelled to satisfy the judgment. The Marshal owes no duty at common law to the surety, and therefore is not responsible to him.
2. Under the statute directing the sheriff or other officer having an execution against more than one, to levy upon the property of the principal in the first instance, the officer is not liable to an action at the suit of the surety, for an omission to levy on the property of the principal, unless the statutory affidavit is made by the surety.

WRIT of Error to the Circuit Court of Mobile County.

This is an action on the case brought by Gregg against Crawford, and its nature will appear from an abstract of the facts alledged in the declaration.

One Robertaille had recovered a judgment in the Circuit Court of the United States, for the Southern District of Alabama, against George W. Botts, William D. Scull and the plaintiff, on a joint and several note, to which the plaintiff was the security for Botts. When the *fi. fa.* issued on this judgment, it was directed, by Robertaille, to be stayed as to the plaintiff, and the defendant, who is the Marshall of the United States

Gregg v. Crawford.

for the Southern District of Alabama, returned that the other parties had no property within his District out of which the money named in the writ could be made.

The three first counts of the declaration are substantially the same, and assert that the defendant omitted to levy the execution on the property of Botts, wrongfully and unjustly intending to wrong and injure the plaintiff; that the return of no property was false, and by means of the premises and for want of other property by Botts the plaintiff has been compelled to pay the amount of the judgment.

An alias *fi. fa.* was afterwards issued on the judgment and the plaintiff then notified the defendant that he was the security of Botts, and directed the defendant to levy the execution on Botts' property, which he pointed out and offered indemnity for the levy. The defendant neglected and refused to make the levy, and by means of this neglect and refusal the plaintiff alleges in his fourth and fifth counts that he has been compelled to pay the amount of the judgment.

The sixth count alleges that after the first execution against Botts, Scull and Gregg was in the defendant's hands, another at the suit of Hamilton & Cole, against Botts only, afterwards came to his hands, which he levied on the property of Botts, and by the sale of it satisfied the junior execution. By means whereof, and for want of other property of Botts, the plaintiff was compelled to pay the amount of the judgment.

The defendant demurred to the declaration, and the Circuit Court sustained the demurrer. The plaintiff assigns this judgment on the demurrer as error.

LESESNE, for the plaintiff in error, cited and relied on Whitaker v. Sumner, 7 Pick. 551; Viner's Ab. Title Officer, B. 1, 744; Comyn Dig. Title Viscount G. a. 552; Glass v. Post, 3 M. & S. 175; Watson on sheriff, 203; Bartlett v. Crogan, 15 John. 250; 8 John. 184; Comyn Dig. Title Pleader, 20; 1 Term Rep. 509; 1 Stewart, 11; Phares & Herndon v. Stewart, 9 Porter, 336.

CAMPBELL, contra, cited Bank of Rome v. Mott, 17 Wendel, 554.

Gregg v. Crawford.

GOLDTHWAITE, J.—The plaintiff's claim to maintain his suit is presented in three aspects in his declaration :

1st. He assumes that it was the defendant's duty to have levied the execution upon the property of Botts and Scull, notwithstanding the stay which was allowed to the plaintiff by the creditor.

2d. He insists that the defendant should not have given the preference to the junior execution of Hamilton & Cole against Botts.

3d. He claims that the defendant was bound, after notice that the plaintiff was security for Botts, to proceed and levy on his property.

In each of these aspects the action is founded on the omission of the defendant to perform a duty supposed to be imposed on him by his office—but in the two first this duty is evidently due to the creditor, and in the last, if due at all, is so to the plaintiff. With respect to all duties imposed by law, or by contract, it is perhaps the universal rule that the action can only be sustained for the omission to perform the duty, by him to whom it is due. This will be evident when it is considered that no other person can waive its performance, or release the damages which are consequent upon the nonperformance.

It cannot for a moment be supposed that Robertaille, the creditor, might not have directed the defendant to return the execution in the manner which he did, without affecting his rights against the plaintiff, and if he had thus directed, the plaintiff would have no pretence of a claim against the Marshal. This then is conclusive to show that the plaintiff had no rights which could be affected by the action of the defendant with respect to the first execution.

The case which is referred to of Whitaker v. Sumner, [7 Pick. 551,] does not, so far as we can understand it, give the least support to the present action. There the defendant had two executions in favor of several plaintiffs, and his duty to each was so to act as to satisfy both, if practicable, and for wilful or even negligent omission to perform this duty, he was liable to an action. But very different from this is the case of an officer who has but one execution, for in that event he owes no obligation to any person except the creditor and the debtor.

This conclusion shows that no cause of action is contained in the first three and the sixth counts.

2. The fourth and fifth counts proceed upon the idea that the defendant owed a duty to the plaintiff, under the circumstances disclosed. This duty, if it exists, arises out of one of our statutes, which is in these terms:

“When an execution may issue against any principal and security on any bill, bond, note or other instrument, the sheriff or other officer shall levy on the property of the principal first, if he has any property in the county where the security resides: *Provided*, the security make oath before some Justice of the Peace that he is security on the said bond, bill, note or other instrument, which affidavit shall be filed by the sheriff or other officer with the execution.” [Dig. 164, §24.]

Whatever duties this statute may impose upon the Marshal, it is clear that none are due until the affidavit is made in the manner required by its terms. There is no averment in either one of the counts that such an affidavit was made and notified to the defendant, and without such an averment there is no sufficient cause of action disclosed.

The judgment of the Circuit Court is affirmed.

FARLEY'S ADM'R. V. NELSON.

1. The rule of practice which provides that all declarations, &c. shall be signed by counsel, where counsel is employed, if not merely directory, does not make a paper purporting to be a declaration defective, because it is unsigned; unless it appears that the plaintiff was represented by counsel, at the time the declaration was filed.
2. A declaration in the plaintiff's name, although not signed by him, if placed on file, will be received as such.
3. Where the declaration omits to state the precise amount of damages, if necessary, reference may be had to the writ, but where the cause of action is a legal

Farley's Adm'r. v. Nelson.

liability, as the statute prescribes the rate of interest, damages need not be laid, either in the writ or declaration.

4. When a party dies pending a suit, a *scire facias* to revive it may, by statute, issue at any time to his personal representative.
5. Under a statute of this State, the service of a *scire facias* is good, though it do not appear that witnesses were present.
6. It is entirely regular to render a judgment against the personal representative of a deceased defendant at the return term of a *sci. fa.* where it has been executed fifteen days before the Court, and the representative does not appear, make himself a party and claim a continuance.
7. The act of 1839, which inhibits the rendition of a judgment at the appearance term applies only to suits commenced by original process, and consequently does not embrace the revival of suits by *scire facias*.

WRIT of error to the Circuit Court of Lowndes.

This was an action of *assumpsit* by the defendant in error as the indorsee of a promissory note against the plaintiff's intestate. The writ was returnable on the first Monday after the fourth Monday in September, 1840, and executed on the 30th of that month. The declaration is entitled of the return term of the process, is blank as to the damages alledged to have been sustained, and without being signed by counsel is subscribed thus—"Plaintiff's Attorney." It does not appear from the indorsement on the writ, or other part of the record, who is the plaintiff's attorney.

On the 15th February, 1841, a *scire facias* issued, alledging the death of the intestate, and calling upon John N. Smith, as his administrator, to shew cause why the suit should not be revived against him. This process was executed on the 18th February, and returnable at the succeeding term of the Court holden on the first Monday after the fourth Monday in March. At the return of the *scire facias*, the suit was revived against the administrator, upon the suggestion of the intestate's death, and a judgment by default rendered against him.

Cook, for the plaintiff in error, insisted that there was no sufficient declaration; that the *scire facias* was prematurely issued and was irregularly executed—and that the judgment was rendered at the return term of the *sci. fa.* within six months after the appointment of the administrator.

BOLING, for the defendant in error. The omission to insert damages in the declaration, or to sign it, it is conceived are unavailable on error. [Phillips v. Malone, Minor's Rep. 110; Wheeler et al. v. Bullard, 6 Porter's Rep. 352; Benson v. Campbell, ib. 455; Elliott v. Smith & Co. use, &c. 1 Ala. Rep. 74.] The record shows that the *scire facias* was regularly executed, and the statute authorizes the judgment to be rendered at the first term after its service, although six months from the granting of letters of administration may not have elapsed.

COLLIER, C. J.—We have no rule of Court, or statute, which makes it indispensable to a declaration that it should be signed by counsel. The fifth of the General Rules, [1 Stew. Rep. 613,] provides that "All declarations, pleas, bills, answers, assignments of error, joinders in error, briefs, &c., must be signed by counsel, where counsel is employed." It may well be questioned whether this rule is not merely directory—but even if it be imperative in its terms, it can have no influence on the case before us. It is applicable only to cases where counsel are employed, and it does not appear that the plaintiff was represented by counsel when the declaration was filed. True, the judgment recites that he came by attorney, but according all verity to this recital, and still there is nothing that informs us that the attorney was employed previous to the term when the judgment was rendered. This being the case, the paper purporting to be a declaration must be regarded as such—it is the statement of a cause of action in the plaintiff's name, and being placed on file by the Clerk of the Court in which the suit was brought, is quite as regular as if it were subscribed by the plaintiff.

The objection that the judgment is rendered for the amount due on the note sued on, with interest, although the declaration does not state the amount of damages sustained, is not available. The writ lays the damages, and this is sufficient—but if it did not, the statute prescribes the rate of interest, and that renders unnecessary the allegation of any precise sum in the record.

By an act passed in 1826, it is enacted "that the return of a sheriff that he has executed a *scire facias*, shall be sufficient, though it do not appear that witnesses were present, "and a

scire facias to the legal representatives of any plaintiff or defendant who may have died pending the suit, may at any time issue from the office of the Clerk of the Court in which the said cause may be pending." [Aik. Dig. 280.] The act of 1822, provides that where an executor or administrator has been duly served with a *scire facias* to revive a suit brought against the testator or intestate, fifteen days before the sitting of the Court, and shall neglect to become a party, the Court may render a judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party. And the executor or administrator who may become a party, shall, on motion, be entitled to a continuance until the next term of the Court. [Aik. Dig. 259.] It is enacted by the act of 1806 as follows: "And to the end that the executor or administrator may have an opportunity to ascertain the situation of the estate of the testator, or intestate, no suit or action shall be commenced or sustained against such executor or administrator, in such capacity, till after the expiration of six months from the time of proving the will of the testator, or of granting letters of administration on the estate of the deceased." [Aik. Dig. 152.]

Upon looking into the record we discover that the *scire facias* was executed in conformity with the statute, more than fifteen days before the commencement of the Court.

The act of 1826, it will be seen, expressly authorized the issuance of the *sci. fa.* to revive the suit in the manner in which it was done in the present case—consequently the suggestion of the intestate's death upon the record, even after the return of the process served upon his administrator was entirely regular.

In respect to the objection that the judgment was rendered at the first term after the service of the *scire facias*, that is expressly authorized by the act of 1802, unless the administrator shall ask the Court for a continuance. The act of February, 1839, "to abolish attorneys fees in certain cases," which inhibits the rendition of a judgment at the appearance term, applies only to suits commenced by original process, in the usual mode, and consequently does not make the judgment in this case premature.

We cannot determine from the record that the judgment was

Moore et al v. Hubbard et als.

rendered within six months after the grant of administration to the plaintiff in error. If such was the case, he should have appeared in the Circuit Court, and there have made an objection to the recovery, until after the expiration of that period.

As the case is presented there is no error, and the judgment is consequently affirmed.

MOORE ET AL V. HUBBARD ET ALS.

1. Where a partnership for the purchase and sale of lands existed between H. and four other persons of the first part, M. of the second part, and D. of the third part, upon a bill filed by H. in his own name against M. and D. for a settlement of the partnership accounts, alledging that he had purchased the interest of his associates and making them defendants to the bill, M. and D. having denied all knowledge of this purchase and requiring proof of the fact—Held, that the answer of the associates of H. could not be read in evidence against M. and D. to prove the right of H. to sue in his own name.
2. A final decree, confirming the report of the Master ascertaining the amount due and awarding execution thereon is sufficiently certain.

APPEAL from the Chancery Court at Talladega.

This was a bill in Chancery, filed by David Hubbard against the plaintiffs in error. The bill charges that some time in the year 1839, the complainant, together with one M. Gilchrist, M. Tarver, G. K. Hubbard and J. Sutherland, as one party, formed a co-partnership and association with William Moore and Jesse Duren for the purpose of purchasing Indian reservations of the lands ceded to the United States by the Creek tribe of Indians, with a view to make a profit by the re-sale of the lands thus purchased. That an article of agreement was executed between the parties on the 6th February, 1834, by which it was expressly stipulated by complainant, for himself and his associates, and by Moore and Duren, that the said three parties were to be interested in equal proportions in all the lands

which had been or might thereafter be purchased by said Duren from Indians within the ceded territory, except Duren's interest in two tracts previously purchased by him, and which are designated—that the money for the purchase of the lands was to be furnished by complainant and his associates and Moore in equal portions, and that all lands so purchased were to be resold within four months after the purchase and the proceeds of the sales first applied to the discharge of the claim of the party who had furnished the purchase money, and the residue divided into three equal portions among the contracting parties—that Moore should keep a true account of all purchases and sales, and be responsible for all money advanced to Duren by complainant and his associates, and it was admitted by Moore in the agreement, that fifteen hundred dollars had been advanced by complainant and his associates, which was to be refunded out of the first sales made of the lands purchased under the agreement which is exhibited.

The bill charges that before and since the execution of the agreement many tracts of land were purchased by Duren for and on account of the concern, which complainant cannot describe, because Moore has never furnished an account of the purchases and sales made under the agreement, but from information and belief charges certain tracts to have been thus purchased which are described, and among which is one thus described: “Also the west half of section sixteen, in township fifteen, range six east, in the Coosa land district, which was bought by the said Duren, from an Indian named *Fixit Hadjo*, for the benefit and with the funds of your orator and his associates,”—and that these lands have been sold by Moore and Duren at large profits.

The bill further charges that the complainant and his associates furnished at different times to Duren, for the purchase of lands under the agreement, various sums of money, amounting in all to the sum of three thousand and eighty dollars—that complainant has purchased the entire interest of Gilchrist, Tarver, G. K. Hubbard and Sutherland, in the aforesaid land and sales, and all things arising thereon, and is now the entire owner of the interest originally belonging to the parties of the first part in the agreement.

The bill charges that Moore and Duren fraudulently conceal

the facts relating to the purchase and sale of lands under the agreement—that the partnership terminated at least twelve months before the filing of the bill, and that since that time, as well as before, Moore and Duren have been using the funds and refuse to settle.

The prayer of the bill is that G. K. Hubbard, Tarver, Gilchrist and Sutherland, as also Moore and Duren, be made defendants to the bill, that the latter be compelled to account, &c.

The defendants, Moore and Duren, answer the bill and admit the execution of the agreement set out in the bill, and both insist that the fifteen hundred dollars mentioned in the agreement was intended as a loan to Duren, and that Moore was to be the surety of Duren, for the repayment of that sum, and no further. The defendant, Moore, insists that he has paid to Hubbard the fifteen hundred dollars advanced to Duren by an interest in another land company. Most of the allegations of the bill are denied—and in particular they deny all knowledge of the fact of the transfer of the interest of the associates of Hubbard to him—and as to all the allegations of the bill not admitted, call for proof.

Sutherland and Gilchrist being shown to be non-residents, publication was made, and a decree *pro confesso* taken against them.

Tarver and G. K. Hubbard answer the bill, and admit the sale of their interest to Hubbard—the answer of the former having been made in the State of Mississippi, without a commission, and sworn to, before one calling himself Judge of Probate of Tippah county, Mississippi.

A reference was made to the Master, to ascertain and report—

First—What lands were purchased under the agreement of partnership?

Second—What sums of money were advanced to make said purchases, and by whom?

Third—What part of the sums so advanced has been paid?

Fourth—What tracts of land so purchased have been sold, to whom, for what price, and who has received the proceeds?

Fifth—What part, if any, of the sum of fifteen hundred dollars

advanced by Hubbard to Duren has been refunded—how paid and out of what fund?

The Master to state an account in a tabular form, so as to present the final result in figures.

The Master stated an account, in which he ascertained that the defendants were indebted to the complainant \$4,108 31.

Numerous exceptions were taken to this report, which need not be noticed here, as they sufficiently appear from the opinion of the Court.

The Court overruled the exceptions, except as to one item of four hundred dollars. The report was recommitted for correction, which being corrected by the Register he reported the amount due \$3,473 65, and the Chancellor thereupon rendered his decree in these words: "The within report being heard and considered, it is ordered and decreed that the same be confirmed, and that complainant have execution for the sum reported according to the principles of the decree rendered during the present sitting of this Court—and it is further ordered that the defendants, Moore and Duren, pay the costs of this Court."

From this decree the defendants prosecute this appeal, and assign for error—

1. In rendering a decree for complainant.
2. In allowing him interest.
3. In sustaining his alledged purchase from his associates.
4. In overruling the exceptions to the Master's report.
5. In admitting the answers of G. K. Hubbard and Tarver, and in proceeding without a regular judgment, pro confesso, as to Gilchrist and Sutherland.
6. In not sustaining the demurrer to the bill.
7. The bill is multifarious.
8. In decreeing to complainant the entire interest of his associates.
9. There is no sufficient decree.

SILAS PARSONS and RICE, for plaintiffs in error, made the following points:

That the bill must be dismissed because the complainant has not proved his right to maintain this action in his own name, which is not admitted, but distinctly put in issue by the answers. That the admissions of the other defendants, his for-

mer partners, of the fact, are not evidence against them—that the answer of one defendant is not evidence against a co-defendant.

That the fifteen hundred dollars mentioned in the article of agreement was a loan to Duren individually, and not a sum of money to be invested in lands for the benefit of all the parties.

That the bill is multifarious.

That the reference to the Master did not authorize him to compute interest.

That the decree is uncertain and inconclusive.

Mr. CHILTON, contra. The only plausible objection to the decree is, that there is no proof that Hubbard had before the filing of the bill acquired the interest of his associates. He insisted that the rule that the answer of one defendant was not evidence against another, did not apply in this case because of the nature of the interest. That the associates of Hubbard were parties to the bill, and that as it regarded Moore and Duren, the decree would operate as an estoppel. He cited Smith's Ch. Pr. 1, 340; Philips Ev. 361; 9 Cowan, 747; 11 Pick. 331; 9th Porter, 79, 93; 4 ib. 245; 1 Dall. 64; 4 John. Rep. 461; 10 Serg. and Rawle, 268.

ORMOND, J.—The object of this bill is to have an account of the transactions of a partnership for the purchase and sale of Indian reservations in the Creek Nation, formed between the complainant and certain persons styled his associates of the first part, W. H. Moore of the second and Jesse Duren of the third part, the terms of which partnership were reduced to writing. The money for the purchase of the lands was to be furnished by the complainant and his associates, and Moore, the land to be purchased by Duren, and the profits which might arise from a re-sale, after refunding the money advanced, to be divided in three equal parts between complainant and his associates, Moore and Duren.

The complainant alleges in his bill that he has become the owner of the entire interest of himself and his associates, by a purchase from them, and they are made defendants to the bill. Moore and Duren in answer to this allegation of the bill, say

they have no knowledge of the fact, and call for proof. Two of the former partners of the complainant answer the bill, and admit that they have sold and transferred their interest in the partnership to him. The other two are non-residents, against whom publication was made, and decrees pro confesso taken.

His Honor the Chancellor held these admissions proof of the fact that the complainant had acquired the entire interest of himself and his former partners. He considered that it was a mere disclaimer of their interest, and that as they were parties to the bill, the decree would operate as an estoppel.

As it is shown by the bill that four other persons were originally equally concerned with the complainant in the money sought to be recovered by the bill, they should have been joined with him in the suit as complainants, to obviate which it is alledged in the bill that the complainant had by purchase from them acquired their entire interest. As this fact was denied by the answer of the two defendants, who are sought to be charged by the bill, it was incumbent on the complainant to prove it. This he attempts to do by the admissions of his former partners, who were made defendants.

It is well established as the general rule in Chancery, that the answer of one defendant cannot be read in evidence against a co-defendant. The exception is where there is an identity of interest, as where all the defendants are partners in the same transaction, [Clark's adm'r v. Van Riemsdyk, 9th Cranch, 153,] or where the defendant whose answer is read, and the defendant sought to be charged, are privies in estate. [Osborne v. The Bank of the United States, 9th Wheaton, 738; Gresly Eq. Ev. 322.] Other exceptions may exist to the rule, but these are sufficient to show the reason of the rule itself. In this case none of the reasons exist which would authorize these defendants to charge Moore and Duren by an admission.

The Chancellor does not appear to have considered the evidence afforded by the answers thus offered against Moore and Duren as establishing facts as evidence against them, but as mere proof of a disclaimer of interest, on the part of these defendants, in favor of the complainant. It is true that such is their effect as between them and the complainant, but they are used for another purpose; they are the only evidence of the right

of the complainant to sue in his own name, which, as his right thus to institute the suit was controverted by those defendants whom he sought to charge, it was incumbent on him to prove. It is therefore the plain case of the answer of one defendant read as evidence against a co-defendant, as between whom there is neither privity of estate nor community of interest, and viewed in this light the answers were clearly inadmissible as evidence against the other defendants.

Nor indeed could the answers operate against the other defendants even as evidence of a disclaimer of interest, as is shown by the case of *Hill v. Adams*, 2 Atkins, 39.

In all other respects the decree of the Chancellor appears to be correct. The position assumed by the counsel for the defendants in error, that the fifteen hundred dollars mentioned in the articles of agreement entered into between the parties, was a loan to Duren individually, and not a part of the capital stock to be invested in the purchase of lands, has no foundation. It is impossible to doubt, taking the whole agreement into consideration, that this money was advanced for the purposes contemplated by the articles of agreement, and was not intended as a mere gratification to Duren.

The objection to the allowance of interest is put upon the ground that there was no reference by the Chancellor to the Master for that purpose.

It is true, the Chancellor does not in express terms direct the Master to compute the interest on moneys in the hands of the defendants. He did however require the Master to ascertain and furnish the *data* by which it was to be ascertained, "and to state the accounts between the parties in a tabular form, so as to present the final results." The right to recover interest where money is improperly withheld, is, in a Court of Equity, as clear as the right to recover the principal. The accounts therefore, could not be stated between the parties without a computation of the interest, and this was the appropriate duty of the Master.

The objection that the bill is multifarious, is not sustained by the record. If the tract of land said to be purchased from the Indian, Fixit Hadjo was, as is supposed, charged in the bill to have been purchased for the benefit of the complainant and his associates, and that the other two partners, Moore and Du-

Tipton v. Nance.

ren had no interest in it, the bill would certainly be liable to the objection made, as it would be the union in the same bill of two distinct and separate interests, but such is not the fact as shown by the bill itself, as it is expressly charged that the money to purchase this tract of land was furnished to Duren, by complainant, under the agreement to purchase lands for the common benefit of the partnership.

The final decree of the Chancellor confirming the report of the Master and awarding execution for the amount ascertained is sufficiently certain.

It results from these views that the decree of the Chancellor must be reversed and the cause remanded, that the complainant may establish his right to sue in his own name.

TIPTON v. NANCE.

1. Where a bill of exchange is purchased by an unchartered company, with its own bills, in the usual course of its business, and suit is brought against an indorser, who is also a partner of the company, in the name of another partner, to whom the indorsement is filed up, it is a partnership transaction, and the suit in the name of the partner is merely colorable and cannot be maintained when it is shown that he has no interest in the bill, and that it belonged at the commencement of the suit, and yet belongs to the company.

WRIT of Error to the County Court of Dallas county.

This action was brought by Nance against the indorser of a bill of exchange.

A great number of questions are raised upon the record, both with respect to the pleadings and the merits of the case, but as only one is determined by the Court, the facts and pleadings in connection with that only are stated. The case was tried on the general issue, and there was a verdict and judgment for the plaintiff.

The defendant offered to prove that the bill was purchased

Tipton v. Nance.

by the Real Estate Banking Company of South Alabama, (an unchartered association of individuals,) and of which both the plaintiff and defendant were partners, with bills of the company, and in its general course of business—that no settlement of the affairs of the company had been made or balance struck between the partners—that Nance, the plaintiff, held the bill sued on merely as agent of the association, though it was indorsed to him, but the property in the bill remained at the commencement of the suit in the company. This evidence was excluded from the consideration of the jury as presenting no defence.

The defendant excepted, and now insists that the evidence should have been admitted.

SAFFOLD and EVANS, for the plaintiff in error, insisted that the legal disability of one partner to sue another cannot be avoided by a colorable transfer, the fact of partnership continues, and it is that which creates the legal disability. [9 Porter, 450; 2 S. and P. 259; 1 Ala. Rep. 100; 5 Cowan, 711; 12 John. 401; 14 Pick. 172; 15 Wend. 156; *Tindal v. Bright*, Minor, 103; 1 Ala. Rep. N. S. 521; 4 Porter, 499; *Ramsay v. Johnson*, *ib.* 418; 2 S. and P. 259; 1 Stark. 78.]

LAPSLEY and HUNTER, for the defendant in error, argued that the evidence was properly excluded, as it went to impeach the plaintiff's title to the bill, derived through the indorsement, but this can be done only under a plea verified by affidavit. [*Beal v. Snedikor*, 8 Porter, 523; 9 Porter, 309.]

As to the merits of such a defence they seem to be settled in *McNair v. Nance*, 2 Ala. Rep. N. S. 349; see also *Chitty* on bills, 251; 1 *Chitty*, 27, 28; *Collyer* on Part. 149, 647, 648; 8 *Cranch*. 30; 3 N. S. Con. R. 14, 15, 16; 7 *Mass.* 304; 13 *Eng. Com. Law Rep.* 383, 384; 11 *ib.* 26; *Story* on Agency, 100, 150.

GOLDTHWAITE, J.—We have held this case sometime under consideration, in order that it might receive a more deliberate investigation than could be given to it in term time. This investigation has confirmed our first impressions that the evidence was improperly excluded from the jury.

Tipton v. Nance.

The plaintiff in this case is shown to be a person clothed with a mere naked legal right, in consequence of the indorsement, but when the amount of the bill is recovered it goes into the general funds of the association, of which the defendant is a partner. If the money was converted by the plaintiff to his own use after receiving it, and he was not also a partner in the concern, an action could only be maintained against him by using the defendant's name in connection with the other partners. Under the circumstances disclosed by the evidence offered, the present plaintiff is merely nominal, and the true plaintiffs in interest are the association. If the suit was in the name of the partners to the association, and the identity of one of the partners suing with the defendant was disclosed in the declaration, it would be bad on demurrer—or if the fact did not appear it could be pleaded. [Mainwaring v. Newman, 2 B. and P. 120.]

The present case does not rest on the principle which governed *McNair v. Nance*, [2 Ala. Rep. 349,] for there the note was given to a trustee for the purpose of launching the partnership, and in equity the contract could only be considered as the agreement of one partner with the others to contribute a certain sum to the common stock. Until the money was actually paid, the partnership had nothing in it. It rather resembles the cases of *Hazlehurst v. Pope*, [2 S. and P. 259,] and *Smyth v. Strader*, [9 Porter, 446,] where the whole subject was examined, and in which it was held that a note or bill given by a firm to one partner, and by him indorsed to a third person in due course of business, could be recovered upon. In both those cases, if the transfer by the partner had been merely colorable, we apprehend the decisions would have been that there could be no recovery.

In New York it is settled by a great number of decisions, that the rights of an assignee will be protected although he may not be a party to the record. [See cases collected in 2 Cowan and Hill's Notes to Phil. Ev. 163, note 172.] We apprehend the converse of the rule, that the rights of a defendant will be protected against a colorable or fraudulent assignee is if possible, yet more clear. The general rule, when the bill or note is indorsed, after it is due, places the plaintiff in the situation of the one from whom he gets it, and is familiar to all.

[Brown v. Davis, 3 Term, 81; Boehn v. Sterling, 7 ib. 424.] So also is that which declares that the defendant is let into all his defences when the holder has received the negotiable paper as a mere collateral security, or with express notice. [Livingston v. Deau, 2 John. Ch. 479; Coddington v. Bay, 5 ib 54.] In the latter case Chancellor Kent thus states the reasons for the commercial rule, that no defence can be admitted except as against the holder of the bill or note. "It is the credit given to the paper, and the consideration *bona fide* paid on receiving it, that entitles the holder to such extraordinary protection, even in cases of the most palpable fraud; it is an exception to the general rule of law, and ought not to be carried further than the necessity which created it."

It is most obvious that the grossest frauds would be introduced if a legitimate defence could be avoided or smothered by the introduction upon the record of a mere colorable party, and whatever may be the intrinsic merits of this case, as between the other members of the association and the defendant, the plaintiff shows no claim to be considered in any other light.

The disability of one partner to sue another upon any contract connected with and arising out of the use of the partnership funds, is not a mere technical disability. It results from the very nature of a partnership, that each partner is liable for all the debts of the partnership, and he never can be certain this liability will not be enforced until the debts are all discharged. But even then, until the affairs of the partnership are finally closed, and the balance of each partner ascertained, he may honestly doubt whether he is a debtor or a creditor of the joint concern.

The present association may perhaps afford an illustration as strong as any other of the general justice of the rule. It is not impossible that the identical bills with which the purchase of this paper was made, are yet outstanding, and may be enforced against this defendant—or other liabilities may already have been enforced against him. It is such and similar considerations which are the foundation of the rule that one partner cannot sue another at law, and we perceive no circumstances in this case to authorize the introduction of an exception, the re-

McWhorter v. Lewis, use, &c.

cognition of which has not been shown, and which, in our opinion does not exist.

On this point in the case we are satisfied the judgment should be reversed, and as it will probably be decisive of the case, we forbear to express any opinion on the other questions raised, farther than to observe that all the pleas demurred to seem to be deficient in certainty, for which, if for no other reason, the judgment upon the demurrer was proper.

Reversed and remanded.

McWHORTER v. LEWIS, USE, &c.

1. Where a promissory note was subscribed thus, "A. A. M. President W. & Coosa R. R. Company," the maker when sued may, under the general issue, or a plea stating the facts specially, defend himself against an action charging him personally, by proving that the note was made for and on account of the corporation designated, in virtue of an authority for that purpose, and so accepted by the payee. But a plea under which such defence is intended to be made, must be verified by oath, according to the statute of this State.
2. When the affidavit of the truth of a plea is necessary, the want of it is a defect available on demurrer.

WRIT of Error to the Circuit Court of Autauga.

The defendant in error declared against the plaintiff in *assumpsit* on a promissory note of the following tenor, viz:

"\$553 00.

On the first day of January next, I promise to pay Henry Lewis, or bearer, five hundred and fifty-three dollars, for the hire of three negro men for the present year, to wit, Billy, Abram and Anderson, this 19th January, 1838.

ALVIN A. McWHORTER,
President W. & Coosa R. R. Company."

The defendant pleaded—1. *Non assumpsit*. 2. That the

Legislature, on the 9th of January, 1836, incorporated by statute the Wetumpka and Coosa Rail Road Company, and among other powers authorized it to elect a President and Directors. On the 4th June, 1836, the Company elected a Board of Directors, who being duly organized, elected the defendant their President. Afterwards, on the 25th December, 1837, the Directors, in virtue of the charter, authorized the defendant to employ, by hiring, slaves and other able bodied hands to work and be engaged in the service of said Company. The plea avers, that in pursuance of the directions of the Company, the defendant hired of the plaintiff three slaves, to wit: Anderson, Bill and Abram, as the agent and President of the Board of Directors, and in that character and none other made the note declared on—that it was delivered to the plaintiff and accepted by him as the note of the Company, and not as the individual note of the defendant. And therefore it is alledged that the credit was given by the plaintiff to the Company alone, and the defendant acted in his official capacity; further that the labor and services of the slave were received exclusively by the Company.

The plaintiff took issue on the first plea and demurred to the second—his demurrer being sustained the cause was submitted to a jury, who returned a verdict in his favor, on which judgment has been rendered.

On the trial the defendant excepted to the ruling of the presiding Judge. From the bill of exceptions it appears that the plaintiff introduced the note in suit, and rested his case. The defendant then proposed to prove that he was duly and legally elected President of the Wetumpka and Coosa Rail Road Company, that the Board of Directors, on the 25th of December, 1837, authorized the defendant, as President of the Company, to employ, by hiring, slaves and other able bodied hands to work and be engaged in the service of the said Company, and that in pursuance of the order and direction of the Board of Directors, he, defendant, hired of the plaintiff three slaves, named in the note, as the agent and President of the Board and Company, and in that character, and none other, made the note for the hire of the slaves. That the plaintiff gave the exclusive credit to the Company, and received the note as its

McWhorter v. Lewis, use, &c.

promise and undertaking—further, the Company received the entire benefit of the services of the slaves hired.

T. WILLIAMS, with whom was S. STORRS, for the plaintiff in error.

PRYOR, for the defendant.

COLLIER, C. J.—Lazarus, use, &c. v. Shearer, [2 Ala. Rep. 718,] was an action against the defendant as the acceptor of a bill of exchange, which was addressed to and accepted by him, as “President of the Selma and Tennessee Rail Road Company.” The cause was tried on the plea of *non assumpsit*, under which it was attempted to be shown that the bill was drawn and accepted on account of the indebtedness of the company to the drawer, and was received by the payee as imposing a liability on the corporation. But the question of the admissibility of such evidence being raised, this Court were of opinion that it was doubtful, from the face of the contract, whether it was intended to operate as the personal engagement of the defendant or to impose an obligation upon the corporation—and that extrinsic evidence was admissible to show the true character of the transaction. Yet inasmuch as the evidence went to deny that the acceptance was, in law, the defendant’s act, as the declaration alledged the plea under which the defence was made should have been supported by affidavit, as required by statute. [Aik. Dig. 283, §137.]

In that case the question of the legal sufficiency of the plea was not made, but the adaptation of the evidence to the issue was reserved by bill of exceptions. Here it is insisted, that the plea which specially sets forth the facts intended to be proved, in order to show that the note declared on, (though made by the defendant,) contained the promise and undertaking of the corporation, is defective for the want of an affidavit. In *McAlpin & McAlpin v. May*, [1 Stew. Rep. 520,] it was held that a demurrer to a plea reaches the want of an affidavit of its truth, when that is necessary. This decision has been often reaffirmed, and could not be departed from at this day, even if wethought that the law should have been otherwise settled.

The matter of the second plea seems to us to present a suffi-

J. C. & J. Crosby v. Lassiter.

cient answer to the action, and if either it, or the general issue on which the case was tried, had been verified, we should have no difficulty in reversing the judgment. But our duties are defined by law, and we cannot afford to the plaintiff in error the benefit of a defence of which, by the manner of pleading, he has deprived himself.

The judgment of the Circuit Court is affirmed.

J. C. & J. CROSBY v. LASSITER.

1. When the record recites that "the defendant failed to file his plea within the time prescribed by law," a memorandum of pleas found in the record, will be presumed not to have been filed within the time prescribed by law, and therefore properly disregarded.

ERROR to the County Court of Conecuh.

Assumpsit on a promissory note by defendant against plaintiffs in error.

The declaration is in the usual form, and an entry on the record of pleas in the following words:

"In this case defendants come and plead in short, by consent, non assumpsit, payment and set off.

Attest, Wm. S. BURD, Def'ts Atto."

The judgment is rendered thus: "Application in this case for continuance on the part of the defendant. On the showing it did not appear that ordinary diligence had been used, and application overruled. This day came plaintiff, by his attorney, service of writ being proved and the defendant having failed to file his plea within the time prescribed by law, but wholly makes default, it is therefore considered," &c.

J. C. & J. Crosby v. Lassiter.

From this judgment this writ is prosecuted, and the defendants now assign for error—

1. The rendition of judgment, without disposing of the pleas.
2. The declaration shows no cause of action.

BOLLING, for the plaintiffs in error, cited 8th Porter, 469; 1 Ala. Rep. 515; 2 ib. 337.

ORMOND, J.—We are unable to perceive that this case differs from the cases cited, in which we have affirmed the judgment of the Court below, notwithstanding it appeared that pleas had been filed.

The record shows that the defendants were in Court and applied for a continuance of the cause, which the Court refused because no diligence had been employed in preparing for the trial. The record also shews that the pleas were not filed within the time prescribed by law. The act of February 2d, 1839, requires the defendant to plead to the merits within the first week of the appearance term, or on failure thereof to forfeit the right of making defence thereafter.

The memorandum of pleas by their name, which appears in the record, seems to have been disregarded by the plaintiff, and from the statement in the record it appears they were not entitled to notice, because not filed within the time required by law. They were therefore properly disregarded by the Court.

We perceive no objection to the declaration, and the judgment of the Court is therefore affirmed.

NORRIS v. BRADFORD.

1. When a slave is loaned by a father to his son, the mere possession of the slave, although it may have induced a credit to be given to the son, will not subject the slave to the payment of his debts.
2. Whenever a contest arises between a creditor or purchaser of a bailee and one claiming to be the owner, the question of fraud is involved—and when property is loaned by a father to a son, for an indefinite period, and for no specific object, it is competent for a jury to infer either that a gift was intended, or that there was a fraudulent intention to deceive creditors.
3. A loan is not an incumbrance within the meaning of the first section of the act of 1823. [Aik. Dig. 207, §4.]

WRIT of error to the Circuit Court of Talladega county.

Trover, for the value of a negro slave. At the trial, a witness, who was the son of the plaintiff, testified that the slave was loaned to him by his father, as a nurse. The witness had possession of the slave for several years previous to his removal from South Carolina, where he formerly resided, to this State—this possession was not uninterrupted, but, during that period, the slave was frequently in possession of the plaintiff, on a visit. The witness removed his family to this State in the spring or summer of 1838, without the knowledge of the plaintiff, and the slave came with him without the consent of the plaintiff. The slave remained in the possession of the witness, under the loan, until she was levied on at the suit of some of his creditors, in the fall of 1839, and was afterwards sold by virtue of an execution, to satisfy debts contracted by the witness. The witness neither disclosed nor concealed the fact that the slave was the property of the plaintiff, when he came to reside in this State, or afterwards, up to the period of the sale. On the day of the sale, and immediately before it was made, an agent of the plaintiff gave notice publicly, to all the bystanders, that the slave was his property, and forewarned all persons from purchasing, as suit would be instituted against the purchaser. The defendant became the purchaser.

On this state of facts, the Court charged the jury that if they

believed the slave was in the possession of the witness when he came into the State and was retained by him to the time of the levy, and that the witness had obtained credit upon the faith of his possession of the slave, then the title acquired by the defendant under his purchase, was good, and they ought to find for the defendant. The plaintiff excepted to this charge, and a verdict having been returned in accordance with it, judgment was thereupon given—to reverse which he prosecutes his writ of error, and here assigns that the Circuit Court erred in its charge.

• PARSONS, for the plaintiff in error.

CHILTON, contra.

GOLDTHWAITE, J.—1. We think the instruction of the Circuit Court to the jury placed this case on a defective principle, and therefore the judgment cannot be sustained, although it is very possible the verdict would have been the same if the proper charge had been given.

The charge assumes that the mere possession of the slave, if it induced a credit to be given to its possessor, is sufficient to subject it to his debts. All bailments would be exceedingly hazardous if such were the law, because there is no class of them which affords any certain means by which a stranger can ascertain in whom the right of property is vested. It is this uncertainty which most probably has induced much of the legislation with respect to frauds, and the limitation of actions for the recovery of personal chattels.

By the common law, possession in all cases, is *prima facie* evidence of the ownership of a personal chattel, and in some, in order to prevent the commission of frauds, this legal intentment is not permitted to be rebutted—but a loan has never been considered as belonging to this latter class. Our statute of frauds has very wisely provided a fixed and definite rule to prevent the resumption of a pretended loan to the prejudice of a creditor or purchaser, after the lapse of three years, and until that period of time has elapsed, the case of a loan is to be determined by the rules of the common law.

2. We apprehend it is universally true, whenever the contest is between the creditor of a bailee, or a purchaser from

him, and one claiming to be the owner, that the question of fraud is involved—for no one ought to permit another to control his property in such a manner as must necessarily lead to erroneous impressions. In the present case, the facts in evidence did not warrant the Court in determining that the plaintiff was not entitled to recover. If the transaction was *bona fide* a loan, it is very clear that the plaintiff's title was not divested, even if his bailee had obtained a credit on account of his possession of the slave. On the other hand it is equally clear, if the pretence of a loan was merely colorable, and made in order to shield the property from the consequences of mismanagement on the part of the son, and was never intended to be resumed, except in such an event, the law will pronounce it a gift, but in either case the question is one of fact for the determination of a jury. [Shacklett v. Kershner, 1 Lit. 226.]

When a loan is made by a parent to a child for an indefinite period, and for no specific object, it certainly would be competent for a jury to infer, that although it might thus be denominated by the parties, in reality it was intended as a gift—or that it was only intended to be resumed in the event there was danger of its passing from the child to a creditor. In the first case the title would be absolute, and in the last a fraud would be contemplated—and in both the property would pass to a creditor or purchaser. [Fitzhugh v. Anderson, 2 H. & M. 280.]

3. It has been supposed by the defendant's counsel that this case may be considered as within the first section of the act of 1823, [Aikins Digest, 207, §4,] but the interest of a lender is certainly not within the meaning of the term *incumbrance*, as used in that statute. Independent of this the precise matter was before the enactment of 1823, covered by the general statute of frauds, which declares that the property shall be deemed to be with the possession, in every case of a pretended loan after a possession of three years. [Aikin's Digest, 207, §3.]

Let the judgment be reversed and the case remanded.

COWLING v. DOUGLASS.

1. The mere neglect of a trustee to sell property, conveyed to him by the grantor, cannot defeat the object of the trust. *Quere?* Would the omission of the trustee to execute the trust for an *unreasonable time*, with the knowledge or assent of the *cestui que trust*, lead to the conclusion that the deed was fraudulent?

WRIT of Error to the Circuit Court of Lowndes.

This was a trial of the right of property under the statute. From the record it appears that a writ of *fieri facias* was issued at the suit of the defendant in error against the goods and chattels, &c. of Wm. J. Staggers, and was levied on a negro man as his property, to whom the plaintiff in error interposed a claim. The question of the liability of the slave to satisfy the execution was tried by a jury. On the trial the claimant excepted to the ruling of the presiding Judge. The bill of exceptions sets forth that the claimant offered in evidence a deed of trust, executed by the defendant in execution, which conveyed the slave in controversy to the claimant, in trust, to pay certain preferred debts. To attack the validity of the deed of trust, the plaintiff in execution offered to prove the value of the property conveyed, and the neglect of the trustee in fulfilling the object of the trust; the claimant objected, but his objection was overruled and the evidence admitted. For the purpose of explaining his seeming neglect, the claimant proposed to prove that he had advertised the trust property, when one James M. Staggers appeared, claimed four of the negroes conveyed by the deed, and forbade the sale; this evidence was rejected by the Court, on the ground that these matters all occurred after the slave in question had been levied on, and the claim of the property was made.

The plaintiff in execution was allowed to attack the validity of the deed, by showing that the claimant never offered to sell any part of the trust property until the execution was levied; and this although the claimant objected to the admission of such evidence.

Cowling v. Douglass.

J. B. CLARKE, with whom was GRAHAM, for the plaintiff in error.

COOK, for the defendant.

COLLIER, C. J.—The material question arising upon the bill of exceptions is this, will the neglect of a trustee to execute the trust affect the validity of the deed by which it is created?

Whenever a trust is created, a legal estate sufficient for its execution shall be considered to be vested in the trustee, if it be possible, though not expressly provided for. [Lewen on Trusts and Trustees, 234.] But his power over the legal estate properly speaking, exists only for the benefit of the *cestui que trust*, yet there are acts which, in virtue of his legal property, the trustee may do to the prejudice of his beneficiary. [2 Story's Eq. 241.] The extent of his legitimate authority over the subject of the trust property depends upon the nature of the trust, and sometimes upon the character and situation of the *cestui que trust*. [Ib. 242.]

Among the acknowledged duties of the trustee, is to apply the trust fund to the purpose of the trust. [Lewen on Trusts and Trustees, 295, 317.] And he is regarded as a mere passive depository, unauthorised to take any part of the estate or its profits, except for the purpose of its defence or protection. [Ib. 412.] Hence it may be regarded as settled that the forbearance of a trustee in doing what it was his duty to do, shall not prejudice the *cestuis que trust*, otherwise it would be in the power of trustees either by doing, or delaying to do, their duty, to affect the right of other persons—which can never be maintained. [Ib. 656; Lechmere v. Earl of Carlisle, 3 P. Wm's. Rep. 215; see also Mordecai & Wanroy v. Tankersly, 1 Ala. Rep. N- S. 100.]

The statement of these principles will be quite sufficient to show, that the mere neglect of a trustee to sell property conveyed to him for the payment of the creditors of the grantor, cannot defeat the object of the trust. It may be possible that the *cestuis que trust* had no notice of the conveyance for their benefit until the levy was made, and under such circumstances, the implication of fraud from the neglect of the trustee, cannot be made to their prejudice. What influence the omis-

DAVIS v. Wade.

sion of the trustee to execute the trust for an unreasonable time with the knowledge or assent of the *cestuis que trust*, should have in inducing the conclusion of fraud, is a question not raised on the record.

The jurisdiction of Chancery over the subject of trusts is very ample, and by a resort to that tribunal, the *cestui que trust*, or others who are ultimately interested in the trust property, may quicken the diligence of the trustee, and coerce an execution of the trust—but a Court of law cannot treat the deed as invalid in consequence of the mere remissness of the trustee in performing his duty. [Lewen on Trusts and Trustees, 486.]

So much of the evidence as related to the advertisement of the trust property, &c. after the levy of the execution, under the view we have taken of this case, was inadmissible, and did not tend to establish any material fact.

Our conclusion is, that the judgment of the Circuit Court must be reversed and the case remanded.

DAVIS v. WADE.

1. An agreement by D. with W. a contractor for carrying the mail, to carry the United States express mail, on a section of ten miles, twice in twenty-four hours, for twelve months, for seven hundred dollars, to be paid quarterly, on the performance of the service, and to be accountable for any "miss mail," the cause of which occurred on that part of the route, is a dependant covenant.
2. The stipulation on the part of D. to be responsible for the injury arising from his failure to deliver the mail in time, was merely an agreement to set off the damage resulting from such omission against his compensation.
3. The parties did not contemplate by that stipulation any failures but those accidental or casual ones which might arise under good management. If, therefore, such omissions were frequent, there would be a failure on the part of D. to perform his contract, and W. might annul the contract and resume the performance himself.

ERROR to the Circuit Court of Butler.

Davis v. Wade.

Assumpsit by the plaintiff against the defendant in error.

Pleas—non assumpsit, failure of consideration, want of consideration.

On the trial the plaintiff offered in evidence the following agreement between him and the defendant :

Articles of agreement between Thomas J. Davis of the first part, and James W. Wade of the second part—witnesseth:

That the said party of the first part agrees to carry the U. S. express mail on a part of route No. 41, from Elyton to Montgomery, for which said Wade is contractor, as follows, viz: From Thos J. Walker's, near to Montevallo, to Scott's, on the road towards Montgomery, supposed to be ten miles, and back, once in every twenty-four hours, for twelve months—the service to commence on the first day of October next, always to start immediately, at such times as the mail may be delivered to him at Walker's, from towards Elyton, and at such times as it may be delivered to him at Scott's, from towards Montgomery, to run through from Walker's to Scott's, and from Scott's to Walker's, generally in one hour, and in no case to exceed an hour and a quarter.

And the said party of the first part further agrees to be accountable for any *miss mail*, the cause of which may occur on that part of the route on which he is to convey the mail.

And the said party of the second part agrees to pay said Davis on the completion of the said service, seven hundred dollars, the payment of which he binds himself to make quarterly, the first quarter to be due the first of March next.

In witness whereof, we, the contracting parties, have hereto set our hands, this 18th August, A. D. 1837.

THOS. J. DAVIS,
JAS. W. WADE,

The evidence on the part of the defendant conduced to show that there were six or seven failures on the part of the plaintiff, jeoparding the mail at both ends of the route, making it difficult, and sometimes impracticable, to deliver the mail in time, and that for these reasons, defendant, about the end of the first quarter, took the carriage of the mail from plaintiff, and dissolved the contract, against the consent of the plaintiff.

The proof also showed that the defendant was subject to be

Davis v. Wade.

fined by the Post Master General for failing in the mail, less or more, according to circumstances, and that he had been so fined during the time plaintiff was sub-contractor.

The plaintiff's counsel requested the Court to charge that the agreement contained independent covenants, and that on a failure to comply by plaintiff, the defendant had no right to annul the contract, but could look alone to the stipulated penalty that plaintiff should be accountable in damages for miss-mails. This the Court refused, and instructed the jury that on a failure by plaintiff to comply with his contract, the defendant had a right to annul it, and resume the performance himself. To which the plaintiff excepted.

Judgment having been rendered for defendant, the plaintiff prosecutes this writ, and assigns for error that the Court erred as shown by the bill of exceptions.

ELMORE, for plaintiff in error, cited 1st Porter, 437.

HARRIS, contra.

ORMOND, J.—The substance of this agreement is that the plaintiff in error agreed with the defendant in error, a contractor with the Government for the carriage of the express mail, to carry the mail twelve months between two points, ten miles apart, twice in twenty-four hours, within a time stipulated in the contract, for the sum of seven hundred dollars, to be paid quarterly—and in the event he failed at any time to perform the service within the stipulated time, he agreed to be responsible to the defendant for the injury arising from the failure of the mail.

Construing this agreement according to its evident sense and meaning, and the clear intentions of the parties, the covenants were dependent, and the plaintiff therefore could not recover without the performance of the contract on his part, or an offer to perform it. It is so considered by the plaintiff, who avers that he entered upon the execution of the contract and performed it by carrying the mail, according to his agreement, for five months, and was ready and willing to perform it for the rest of the year, but was prevented from so doing by the defendant.

There is, however, another term in the contract out of which

Davis v. Wade.

the controversy in this case arises. The plaintiff agreed to be responsible for any "*miss mails*," the cause of which occurred on the part of the mail route on which he was to transport the mail.

We think it cannot be doubted that the meaning of this part of the contract is, that the parties were stipulating for the accidental or casual omission to deliver the mail within the prescribed period—that with the best possible management such failures would occur, when the travel was at the rate of ten ten miles an hour, must have been, and was, foreseen, and such casual omissions were by the agreement provided against by the plaintiff agreeing to be liable to the defendant for the injury resulting to him from such failure. The ten miles upon which the plaintiff agreed to transport the mail, was only a section of a large route; a failure, therefore, on this part of the route, to deliver the mail within the prescribed time, would generally cause a failure throughout the entire route, from the difficulty, if not impossibility of increasing the speed of the horses on the residue of the route beyond ten miles an hour. It cannot therefore be presumed that the parties contemplated any thing beyond those accidental or casual omissions to deliver the mail in time which might be expected under good management.

The frequent occurrence of such failures was not contemplated by the parties, and would therefore be a failure on the part of the plaintiff to perform the agreement on his part, which was a condition precedent to his recovery.

The stipulation on the part of the plaintiff to be responsible for the injury arising from his failure to deliver the mail in time, was merely an agreement to set off the damage which might result from such omission against the compensation for carrying the mail, and cannot be construed to confer on the plaintiff a right to continue to carry the mail in a negligent or improper manner, to the probable ruin of the defendant, leaving him to seek redress in another action.

If, therefore, the plaintiff did not comply with the contract on his part, the defendant had a right to resume the performance himself, in the same manner as if the plaintiff had not entered upon the performance.

Hill v. Rushing and Wood.

There was therefore no error in the charge given, or in the refusal to charge as moved for by the plaintiff, and the judgment is therefore affirmed.

HILL v. RUSHING AND WOOD.

1. An action of covenant may be maintained on an attachment bond.
2. In assigning the breaches in such an action, if the damages alleged to have been sustained exceed the penalty of the bond, it is proper to assign the non-payment of the penalty; if they do not amount to as large a sum as the penalty then the breach will be the non-payment of the damages actually sustained.
3. Actions upon attachment bonds are governed in all respects by the rules applicable to actions on the case for wrongfully suing out attachments, but the recovery never can exceed the penalty of the bond.

WRIT of Error to the Circuit Court of Benton county.

Action of covenant on an attachment bond conditioned to prosecute a certain suit, therein described to effect, and to pay all such costs and damages as the defendant in the attachment (the plaintiff in this suit,) should sustain by its being wrongfully or vexatiously sued out.

The declaration sets out the bond and condition, and then avers that the attachment was sued out without any good and sufficient reason, and for wrongful and vexatious purposes—and furthermore, that it was void for the want of a sufficient affidavit. It then proceeds to aver that the plaintiff has sustained damages to a specific amount by reason of his slaves having been levied on by the said attachment, and kept from him for the space of ——— days. Also in his having been compelled to pay costs and employ counsel to defend himself from the said attachment, and to regain possession of his slaves—and also in his credit, which has thereby been greatly injured. The aggregate of these several items of damages exceeds the penalty of the bond, and it is averred that the defendants had due notice of all the said damages and costs.

Hill v. Rushing and Wood.

The declaration then concludes with the following averment of the breach of the condition: "Yet the said defendants have not kept their covenant and undertakings, but have broken the same in this, that they have not paid to the plaintiff the sum of sixteen hundred dollars, (i. e. the penalty of the bond,) nor has the said Rushing, (the plaintiff in the attachment,) prosecuted his said attachment to effect—nor has either of the said defendants at any time paid to the said plaintiff such costs and damages as he has sustained by the wrongful and vexatious suing out of the said attachment—but so to do they have hitherto wholly failed and refused, and still refuse, to pay the plaintiff's damages of two thousand dollars."

The defendants demurred to this declaration and the Court sustained the demurrer. To reverse the judgment rendered thereon in favor of the defendants, the plaintiff prosecutes this writ of error.

CHILTON, for the plaintiff in error.

STONE, contra.

GOLDTHWAITE, J.—In the case of *Herndon v. Forney*, at the present term, we determined the principal question arising in this case, in favor of the plaintiff in error. The only differences between this case and that are that this is an action of covenant, and that here the breaches of the condition of the bond are assigned in the declaration.

1. We cannot perceive that any substantial reasons exist against allowing the action of covenant in such a case as this, when the plaintiff chooses to select it in preference to the action of debt. In either case, under our practice, he must assign breaches, and can only recover the actual damages made out by the evidence.

2. With respect to the breaches, we think they are substantially good. It will be seen that the aggregate of the damages alledged to have been sustained, exceeds the penalty of the bond, therefore it was not improper to confine the averments with respect to the non-payment of damages to the amount of the penalty. It would be proper, in a case where the damages alledged to have been sustained do not amount to the penalty, to alledge the breach in the non-payment of the damages thus

Harris et al v. Bradford.

shown to have been sustained, as this the condition of the bond.

We may remark further, that the effect of our decision in the case of Herndon v. Forney, as well as the one now pronounced, is, that whenever the defendant in an attachment selects his remedy on the attachment bond in preference to his action on the case against the plaintiff in the attachment, for wrongfully or vexatiously suing it out, the former suit is to be governed, in all respects, by the rules applicable to the action on the case, except the recovery, which of course cannot exceed the penalty of the bond.

This leads to the conclusion that the judgment of the Circuit Court, on the demurrer, is erroneous.

Let it be reversed and the cause remanded.

HARRIS ET AL V. BRADFORD.

1. Where a notice to a sheriff and his sureties stated that the plaintiff *did* move for judgment against them for a failure to return an execution, &c. on the eleventh day of the term, which day was four days after the date of the notice—*Held*, that although the notice was in the past, it was to be understood as referring to a motion to be made in future.
2. In a proceeding against a sheriff and his sureties, if the former only plead, the fact of suretyship must be proved—but if the sureties alone appear and plead, they must put in issue the execution of the official bond, by a plea of *non est factum*, in order to require the plaintiff to prove their suretyship.
3. It is an available defence for a sheriff, or his sureties, in a summary proceeding against them, for the failure of the former to return an execution, that he had placed it in the hands of a deputy to execute and return, who was prevented by sickness, which disqualified him for such business, from returning the execution—and that the sheriff was absent from the county, having left it when the deputy was able, and expected to, perform the duties of his office.
4. It is no excuse at law for the failure of a sheriff to return an execution, that the defendant therein was insolvent while the same was in force.
5. The discontinuance of the notice of a motion for failing to return an execution, as to the sheriff and such of his sureties as have not been served, will not affect a judgment rendered against the other sureties.

Harris et al v. Bradford.

6. A memoranda written by the presiding Judge across a motion entered on the motion docket, will authorise an entry *nunc pro tunc*, at a succeeding term.
7. When the Judge of the County Court has taken the bond of a sheriff, and deposited it in the Clerk's office, he cannot withdraw the same and alter or vacate it, on the ground that it was not such as he had intended to approve. This being the case, an alteration made by him, though in a material part, will not affect its validity.

WRIT of Error to the Circuit Court of Tallapoosa.

This was a proceeding by motion against the plaintiffs in error as the sureties of Martin T. Ellis, sheriff of Tallapoosa, for the failure of the latter to return an execution previously placed in his hands at the suit of the defendant in error, against John Bradford. The notice is addressed to the sheriff and his sureties by name, sets out the time of the issuance of the execution and its delivery to the sheriff, as well as its amount, &c. and proceeds as follows: "And the said Martin T. Ellis having failed to return said writ of execution, the said plaintiff did, during the present term of the Circuit Court, to be holden for said county of Tallapoosa, on Friday, the eleventh judicial day of said term, being the 9th day of April, instant, move for judgment against the said Martin T. Ellis, late sheriff as aforesaid, and the said Major Harris," &c., "his sureties as aforesaid for the amount of said writ of execution and costs of this motion. 5th April, 1841."

At the term of the Court indicated by the notice, a motion in the form of a suggestion was submitted for a judgment against the defendants for the amount of the execution—and a discontinuance was entered as to the sheriff and one of his sureties, on whom the notice was not served.

The defendants demurred to the notice, and their demurrer being overruled, they craved oyer of the sheriff's bond, and pleaded—

1. *Non est factum*.
2. A denial of the fact that they were sureties as alledged.
3. As an excuse for the failure to return the execution, the sickness of the sheriff's deputy, to whom it was intrusted, and the absence of the sheriff from the county.
4. That the sheriff did not fail to return the execution as alledged.

5. The defendant in execution was insolvent from the time the execution was received up to the period when it was returnable.

The plaintiff took issue on the first and fourth pleas, and on his motion the second plea was stricken out—thereupon he demurred to the third and fifth pleas, and his demurrer being sustained, the cause was tried on the issues of fact.

On the trial the presiding Judge sealed a bill of exceptions, at the instance of the defendants, from which it appears that the bond executed by the sheriff and his sureties, was, when approved by the Judge of the County Court, in the penal sum of seven thousand dollars, that the Judge of the County Court had intended to require of the sheriff a bond for ten thousand dollars, and at the time of its approval supposed such was the penalty inserted—but after the bond was approved and handed to the Clerk to be recorded, it was discovered that the penalty was not what the Judge had intended, and he then altered it by writing the word “ten” over “seven.” All this was done without any intention on the part of any one to defraud, and the bond as recorded was for ten thousand dollars.

The Court charged the jury, that if the Judge of the County Court approved the bond under a belief that it was for ten thousand dollars, and would not have approved it had he been aware that it was for but seven thousand dollars, yet it was a valid bond for the latter sum: And further, if the Judge actually approved and handed the bond to the Clerk for record and afterwards wrote upon the word *seven* the word *ten*, no one assenting thereto, yet it was a valid bond for seven thousand dollars.

The counsel for the defendants moved the Court to charge the jury—

1. That if the Judge of the County Court approved the bond for seven thousand dollars under a mistake, believing it was for ten thousand dollars, it was not a valid bond even for the smaller sum.

2. If the Judge who approved the bond altered the same in a material part, without the assent of the sureties therein, it was thereby rendered invalid. Which charges the Court refused to give.

The defendants also offered evidence to show the insolvency

of the defendant in execution during the time the same was in force, but this evidence was rejected by the Court.

At a term of the Circuit Court holden in April, 1842, the plaintiff by his counsel moved the Court to cause an entry of the motion in this case to be made and continued as of April term, 1841. It being shown to the Court that the motion was then entered on the motion docket, and across that entry, in the hand-writing of the presiding Judge was written "continued," the minutes were directed to be perfected *nunc pro tunc*. A verdict having been found for the plaintiff, and judgment thereon rendered, the defendants have sued a writ of error to this Court.

It is here assigned for error—

1. That the Circuit Court struck out the second plea on motion.
2. That the demurrer was sustained to the third and fifth pleas and overruled to the notice.
3. The motion was discontinued, and the continuance should not have been entered *nunc pro tunc*.
4. The Court erred in the several matters shown by the bill of exceptions.

MORRIS and N. HARRIS, for the plaintiffs in error.—The third plea sets out a sufficient excuse for the failure to return the execution, and the demurrer to it was improperly sustained. [Roberts & Battle v. Henry, 2 Stew. Rep. 42.]

The motion was discontinued in the Circuit Court by the omission to enter upon the minutes a continuance at the term at which it was submitted, and the entry *nunc pro tunc* was irregular. [Thompson v. Miller, 2 Stew. Rep. 470; Broughton et al v. The State Bank, 6 Porter's Rep. 48; Armstrong v. Robertson & Barnwell, 2 Ala. Rep. 164.]

Anciently, the alteration of a bond by a party, or privy, even in an immaterial part avoided it, and a material interlineation or erasure by a stranger had the same effect. [11 Coke's Rep. 27; Bull. N. P. 267; Com. Dig. Tit. Fait, 166; Cro. Eliz. 626, 657; 5 Co. Rep. 23; 5 Taunt. Rep. 706; Shep. Touchs. 69.] The modern rule seems to be that the alteration of a bond by a party, or privy, to avoid it must be material, and that no alteration by a stranger will affect its validity. [15 John. Rep.

Harris et al v. Bradford.

297; 6 Cow. Rep. 746; 10 Conn. Rep. 192; 18 John. Rep. 499; 16 Sergt. and R. Rep. 44; 1 Nott & McC. Rep. 554.] The Judge of the County Court must be regarded the agent of the State, who is a party, and the alteration of the bond by him made it invalid for all purposes. [Aik. Dig. 388, 387; Jewett et al v. Hodgson, 3 Greenl. Rep. 103; Miller v. Stewart et al, 9 Wheat. Rep. 680; United States v. Hatch, Paine's Rep. 336; Barrett v. Thorndyke, 1 Greenl. Rep. 73; O'Neill v. Long, 4 Cranch's Rep. 59.]

The bond was never good even for seven thousand dollars, for want of the approval of the Judge of the County Court. True the bond was approved in fact, yet the Judge was mistaken as to the amount of the penalty, or he would have rejected it. This misapprehension prevented the approval from becoming operative; and it was competent for the Judge to call upon the sheriff to permit such a bond as he had intended to require, and supposed he was receiving.

Lastly—the act of 1819, [Aik. Dig. 164,] does not authorize the recovery of a judgment against the sheriff and his sureties for the failure to return an execution. True it was decided otherwise at an early day, and that decision has been repeatedly followed, yet as these decisions are sustained by a misconstruction of the statute, with which the present members of the bench have expressed themselves dissatisfied, we respectfully ask that they may be overruled, and the act receive the exposition to which, upon principle, it is entitled.

CHILTON, with whom was B. F. PORTER, for the defendant. An alteration by a stranger does not avoid a deed. [6 East's Rep. 308; S. C. 2 Smith's Rep. 400.] After the approval and delivery of the bond for registration, the Judge of the County Court had no authority to act further in regard to it, and his interference was that of a stranger. [Rees v. Overbaugh, 6 Cowen's Rep. 746, and cases there cited.]

Upon the other points raised they were willing to submit the cause without argument.

COLLIER, C. J.—1. The demurrer to the notice was properly overruled. Every material fact necessary to be alledged is stated in the notice—and the only objection to it is, that in-

stead of saying a motion will be made at the time indicated, it states "that the plaintiff did move for judgment." This must be considered as a mere verbal mistake, which may, or may not, have been made by the Clerk, but be this as it may, it cannot prejudice; for it appears by a reference to the date of the notice, that the motion would be made four days thereafter.

2. If this proceeding had been instituted against the sheriff and his sureties, and the former alone pleaded, it would have been necessary to prove to the Court the fact of suretyship. [McWhorter et al v. Marrs, Minor's Rep. 376; Barton et al v. The Bank of the State; 1 S. and Porter's Rep. 471; McRae et al v. Colclough, 2 Ala. Rep. 74.] But the motion was against the sureties alone, who appeared and pleaded, and it was not necessary to show that they executed the official bond of their principal; unless the pleading put that fact in issue. The *onus* of making such proof in such a case, it has been held, can only be thrown upon the plaintiff by a plea of *non est factum*, which the statute requires to be verified by oath. [Jameson v. Harper, 1 Porter's Rep. 431.] The finding of the jury against the defendants on the issues, affirmed their partnership, and the second plea, according to the case last cited, was clearly bad, and therefore correctly stricken out.

3. In Roberts and Battle v. Henry, [2 Stewart's Rep. 42,] it was determined that the statutes which make a sheriff liable to pay the amount of an execution, which he had failed to return, was not so peremptory in its terms as to admit of no excuse for the omission. That case it is true was a suit in equity, in which the complainant alledged as an excuse for not defending at law, his inability to attend the Court, so as to resist the motion. But the principle it is conceived must obtain at law; for the powers of the latter forum are in this respect co-extensive with those of Chancery, if the defence can be made out by legal proof. There the sheriff attempted to show that he had placed the execution in the hands of a man who was going to the office of the Clerk who issued it, to be delivered to him, in obedience to its mandate—it having been issued from a distant county. So in Marchbanks v. Rogers, [1 Stew. Rep. 148,] the Court said that a motion for failing to return an execution

would not lie against a sheriff where it appeared that execution had been superseded.

The sheriff who fails, from neglect or other cause to return an execution, may be called on to answer to a rule *nisi*, for an attachment, yet the mere omission of duty is not conclusive to show that he is guilty of a censurable violation of law. Now we will not say that the proceeding provided by statute is analagous to the common law remedy by attachment, but we will say, that in expounding the statute a regard should be had to pre-existing remedies; and though the terms of the act may be imperative, the old law, as well as the reason of the thing, should be referred to in order to ascertain the qualifications, and soften its seeming harshness.

A sheriff is not obliged to perform in person all the functions of his office, but it is competent for him to appoint a general deputy, either verbally or by writing, and a deputy so constituted, may do any act of a ministerial nature, which his principal could do. [McGee v. Eastis, 3 Stew. Rep. 307; see also Tillotson v. Cheetham, 2 John. Rep. 63; Jackson ex dem Masten v. Bush, 10 ib. 223; Jackson ex dem Randall v. Davis, 18 ib. 7; Brookyn v. Patcher, 8 Wend. Rep. 47.] But the sheriff cannot, by intrusting his official business to a deputy, free himself from responsibility—he will be answerable *civiliter* for the acts of the latter. Yet it would seem that he will not be chargeable for an omission or act of his deputy, which, if attributable to himself personally, would not be regarded as a violation of duty. If the sheriff had retained the execution, and at the time when it should have been returned was too sick to return or cause its return, this upon the authority cited, would have excused the omission. And will it not equally avail him to show that he had intrusted the execution to a deputy who was prevented from returning it in consequence of sickness, and that absence from the county prevented him from giving his own attention to the business? In reason, we think, the cases are not distinguishable.

In cases of this character the usual exactness in pleading is not required, but it is entirely regular for the sheriff or his securities, without respect to form, to state by way of plea the facts on which he relies for his defence. The third plea sufficiently informs the plaintiff what the defendants proposed to

prove. True it is not alledged *in totidem verbis* that the sickness of the deputy sheriff was so severe as to render it exceedingly difficult, if not impracticable for him to return the execution, yet terms perhaps of equivalent import are stated—and in order to make out the plea, it should be shown that the sickness relied on as a defence was such as disqualified for such business. Nor will the mere sickness of the deputy avail but it should be shown that the sheriff left the county at a time when he was able, and expected to perform the duties of the office.

This defence being available for the sheriff must be good for his sureties, whose liability cannot be more extensive than that of their principal.

4. It has been repeatedly held here, that a sheriff or his sureties, against whom a motion has been made for the failure to return an execution, cannot be permitted to alledge the insolvency of the defendant as an excuse for the neglect. Whether such an allegation can be entertained in a Court of Equity, it is foreign to our purpose to inquire; but we cannot forego the remark that a recovery against the sheriff, when it is obvious that nothing could have been made on the execution, is indefensible in morals, and must be denounced when scanned by an enlightened conscience. This remark of course has no application to the case before us, for we cannot know but that the defendant in execution was entirely solvent.

5. The discontinuance, (as it is somewhat inaccurately called,) as to the sheriff and his sureties not served with a notice, does not affect the regularity of the judgment against the other sureties. The plaintiff was expressly authorized by statute "to recover judgment against such of the parties as service may have been effected on." [Act of January, 1841, Meek's Sup. 346; see also *Hill v. The Bank of the State*, 5 Porter's Rep. 537; *Bondurant et al v. Woods & Abbott*, 1 Ala. Rep. 543.]

6. The entry of the motion made in April, 1842, as of the term when it was submitted was regular and is sustained by repeated decisions of this Court. The motion docket contained a *memoranda* which warranted the Court in perfecting that which should have been previously done.

7. The Judges of the County Courts are invested with au-

thority to take the bonds of sheriffs in their respective counties, and are directed to deposit them in the Clerk's office. [Aik. Dig. 388.] This is a special power, and when it has been exercised, the Judge is not authorized to withdraw and alter or vacate the bond, under a pretence that it was not such as he had intended to approve. The sureties can rarely be prejudiced by a mistake of the Judge of the County Court in this respect, for he is required on application of any one of them to call on the sheriff for a new bond, and if the same is not given to vacate his office. It is not competent for the sureties to allege that the bond is invalid because the penalty is less than the Judge had intended to require, or supposed it to be—if it was executed and delivered by them, or their authority, it became obligatory upon them as soon as it was received and deposited with the Clerk.

The modern rule as to the effect of an alteration of a bond, has been correctly stated in argument, and has been heretofore affirmed by this Court. [Brown v. Jones, 3 Porter's Rep. 420.] If, as we have said, the power of the Judge of the County Court is limited to the taking and depositing the bond, it necessarily follows that when this has been done, he is a stranger to it, not even entitled to its custody. This being the case, the substitution of *ten* for seven thousand dollars, however material and destructive if done by a party, or privy, cannot, when made by a stranger, impair its validity as a bond for the latter sum.

To conclude, we are unable to discover any error in the points presented, save only in overruling the demurrer to the third plea—and for that cause alone the judgment is reversed and the cause remanded.

CHILTON & PRICE v. ROBBINS, PAYNTER & Co.

1. A surety who is fully indemnified by the principal debtor against loss, cannot avail himself, in a suit against him by the creditor, of the defence that the creditor had given time to the principal debtor, without his consent, and that he was thereby discharged.

ERROR to the Circuit Court of Benton county.

Assumpsit on promissory note by the defendants in error against the plaintiffs in error.

Upon the trial, as appears from a bill of exceptions, the defendants proved they were the sureties of one Pearson as to whom the suit had been discontinued, and that the plaintiffs some time before the commencement of this suit, had made an agreement upon a new consideration, moving from Pearson to the plaintiffs, by which they agreed to postpone the time of payment on the note sued on, for near a year after it fell due, to which agreement the sureties were not privy, and did not consent.

The plaintiffs proved that the sureties had obtained from the principal a deed of trust on property to secure themselves against liability on their suretyship, which was ample for that purpose—whereupon the Court charged the jury that the agreement between the creditor and the principal debtor to postpone the day of payment of the demand without the knowledge or consent of the sureties did not absolve the sureties from the payment of the debt, although time was actually given, because the sureties had taken an indemnity from the principal debtor against the demand, and had never given the plaintiffs notice to sue—to which charge the defendants excepted.

Judgment having been rendered for the plaintiffs the defendants prosecute this writ of error, and assign for error the charge of the Court.

CHILTON, for plaintiffs in error, cited 2 Stewart, 63; 3 Stewart, 14; 6 Porter, 156.

WALKER and RICE, contra, cited 12th Wend. 123; 3 Dana, 591; 7 ib. 307; 5th Mass. 170; 1 Serg. and Rawle, 334.

ORMOND, J.—The plaintiffs in error were doubtless discharged by the time given the principal debtor by the defendants in error, without their consent, unless the fact that they are fully indemnified by the principal debtor will prevent their availing themselves of it, and in our opinion it must have that effect.

The taking by the sureties of a deed of trust or mortgage from the principal debtor to secure them against liability, and *ample* for that purpose, is in effect an appropriation by them of that portion of the effects of the principal to the payment of this debt, and they will not therefore be permitted to urge that they are not responsible. The cases cited by the counsel for the defendant in error that the taking by an indorser of an assignment of the effects of the maker as indemnity against loss upon the indorsement, is a waiver of demand and notice, or an admission of notice, are in principle quite analagous to this case. The case of Moore v. Paine, [12th Wendell, 123,] is in point. There the sureties were discharged by the act of the creditor, but being fully indemnified by the debtor, were held liable to the creditor. The Court say, "The discharge of Freer, (the debtor,) could in no possible way interfere with their rights or liabilities so long as they held in their hands a complete indemnity against the bond and he is not accountable to them if they are obliged to pay it."

The same principle was affirmed in the case of Bradford v. Hubbard, [8th Mass. 155.] An accommodation indorser who was fully indemnified by the drawer, sued the acceptor of a bill of exchange, the bill having been accepted for the accommodation of the drawer. The Court recognized the principle that an accommodation acceptor was responsible to a *bona fide* holder of a bill, although he knew the acceptance was for the accommodation of the drawer; but the Court refused to permit him to recover of the acceptor, on the ground that he was fully indemnified. The language of the Court is, "we consider the appropriation of the proceeds of the effects of John R. Bradford, (the drawer,) to the payment of the plaintiff as indorser of this bill in the same light as if the money was in

Durden v. Cleveland.

his own hands. It is so appropriated by the assignment, and the money is at the command of the plaintiff whenever he chooses to receive it."

These cases are decisive of the principle contended for by the defendants in error, and as they command our approbation the judgment of the Court below must be affirmed.

DURDEN v. CLEVELAND.

1. A bill in equity is not evidence of the facts stated in it against the complainant unless sworn to by him.
2. When a written agreement between the plaintiff and defendant shows that the notes sued for were given for the price of an undivided moiety of a tract of land and a saw-mill, and which also contains an agreement that a co-partnership shall exist in the saw-mill, the breach of the contract with respect to the co-partnership, is no defence to the suit for the price of the land, because the agreement for the partnership forms no part of the consideration of the notes.

WRIT of Error to the Circuit Court of Autauga county.

The plaintiff declared in assumpsit on a promissory note for five hundred dollars, and it appears from the record that two other cases were consolidated with this, but the transcript does not contain the declarations filed in those cases. The defendant pleaded non-assumpsit, payment, want and failure of consideration, and the plaintiff had judgment upon a verdict returned in his favor on these issues.

In the progress of the trial the defendant offered to read in evidence a certified copy of a bill in equity, filed against him by the plaintiff, praying that certain lands described in an instrument executed by the parties, and in evidence before the jury, might be subjected to the payment of the notes sued for. The object in recording this bill was to identify the notes with those described in that instrument. The Court refused to admit the copy of the bill as evidence. The instrument of wri-

Durden v. Cleveland.

ting in evidence was an agreement between the parties, which recited that Cleveland, on the twentieth May, 1835, had bargained and sold to Durden one undivided half of a certain tract of land and a saw-mill, for which Durden agreed to pay fifteen hundred dollars, with interest from date, in three payments—\$500 on the 20th May, 1836, \$500 on the 20th May, 1837, \$500 on the 20th May, 1838; these payments could be discharged with good notes on solvent persons in Lowndes or Autauga counties. Cleveland agreed to execute complete and perfect titles for the land at any time previous to the 20th May, 1838, when the purchase money should be paid, or at the time when the last payments should be made.

It was also mutually understood between the parties that they, from the 20th May, 1835, entered into co-partnership in the said saw-mill and lands, and that all the tools, and other things necessary to carry on the saw-mill, to wit: one yoke of oxen, cart, saws, axes, &c., which were then about the mill, should remain and be employed for the benefit of the partnership; Cleveland on his part agreed to furnish two good hands to cut and haul stocks and work at any thing which should be necessary to carry on the partnership. Durden on his part agreed to superintend the business, attend the saw and keep it in good order, running as steady as possible, and also to keep the running gear in good repair. The parties were to have equal shares of the profits arising from the sale of lumber cut by the mill, and were to pay equal shares of all expenses thereafter incurred.

The defendant proposed to introduce evidence to show an entire non-compliance on the part of the plaintiff with the terms of this instrument, but the Court excluded the evidence. The defendant thereupon excepted to the opinion of the Court in these several matters, and now insists that there was error in refusing to admit the copy of the bill in evidence and in the exclusion of the evidence showing a non-compliance by the plaintiff of his stipulations.

HAYNE, for the plaintiff in error.

GOLDTHWAITE, J.—1. The rejection of the copy of the bill in equity between these parties when offered as evidence

to establish the identity of the notes sued on with those described in the written instrument, afterwards before the jury, is not a matter of importance in its connection with the case, because this identity could have no influence unless some defence was made out.

But conceding that the fact of identity was material, it could not be thus established. The established rule is now to consider a bill in equity as the mere allegation of counsel, unless the party is connected with it by proof, showing a recognition of its contents, as would be the case if the bill was verified by the complainant's oath. It is possible other modes of recognition might be shown, but we need not examine this subject further, as there is here no pretence of any recognition of the bill. The case in this aspect does not differ from that of *Adams v. McMillan*, 7 Porter, 73; see also *Rankin v. Maxwell*, 2 Marsh. 488; *Gresley Eq. Ev.* 322; 3 C. & H. Phil. E. 923.

The other question raised is with respect to the exclusion of the evidence of a non-performance of the stipulations of Cleveland respecting the partnership.

From an examination of the agreement between the parties it will be seen that the consideration of the notes sued for was the price of the land agreed to be sold. None of the stipulations respecting the partnership entered at all into the consideration of these notes—and the refusal of the plaintiff, or his omission to comply with his agreement about the manner in which the partnership should be carried on, cannot affect his right to recover the price paid for the land.

The sale of the land and the agreement to form the partnership are entirely distinct; and there is nothing in evidence to show that the latter was intended in any manner to control the former; therefore our conclusion is, that the Court below very properly excluded the consideration of the breach of the contract respecting the partnership from the jury. This did not affect the consideration of the notes, for they were to be paid before the plaintiff could be required to give a title, and no fraud is pretended.

Let the judgment be affirmed.

HOLMES v. BULLOCK.

1. H. G. H. was indebted to J. M. B. who assigned his account to J. A. B. to whom, as assignee, the debtor executed his note for the amount—afterwards H. G. H. paid some notes previously made by J. M. B. as principal and himself as surety: *Held*, that these payments did not constitute a set off in an action on the note at the suit of J. A. B.

WRIT of Error to the Circuit Court of Autauga.

The defendant in error declared against the plaintiff in *assumpsit*, on a promissory note of the following tenor:

“One day after date I promise to pay James A. Bullock, assignee of Joseph M. Bullock, or bearer, fifty-one dollars and fifty-four cents, with interest from the first day of January last, for value received. February 20th, 1841.

H. G. HOLMES.”

The cause was tried on the pleas of *non assumpsit*, payment, set-off, fraud, and want of consideration. On the trial a bill of exceptions was sealed by the presiding Judge, at the instance of the defendant. By the bill it is shown that the defendant introduced a witness who was the agent of the plaintiff in settling the claims of Joseph M. Bullock, which the plaintiff held as assignee. Witness was present when the note sued on was made—plaintiff was also present; the defendant then asked the witness if certain notes then in his, (defendant's,) possession, and in which defendant was a surety for Joseph M. Bullock were paid, to which the witness replied, he had been so informed by Joseph M.—defendant also remarked, he had heard they were paid. The note sued on was given in liquidation of a debt due by defendant to Joseph M.

The defendant then proposed to prove the hand-writing of Joseph M. to the notes produced by him, their payment by him as his surety, since the note declared on was made, and to read them to the jury as a set-off—but on plaintiff's objection, this evidence was rejected. A verdict was found for the plaintiff

Holmes v. Bullock.

for the amount of the note and interest, and judgment was thereupon rendered.

POPE, for the plaintiff in error.

ELMORE, for the defendant.

COLLIER, C. J.—Although the consideration of the note which the plaintiff is seeking to recover was an indebtedness to Joseph M. Bullock, yet by making the plaintiff the payee, he became invested with the legal right to the sum expressed on its face. The terms “assignee of Joseph M. Bullock,” do not change the effect of the defendant’s undertaking, but rather show under what circumstances he became entitled to the debt. It does not appear whether the notes in which defendant was a surety were paid before this suit was brought—but even if it did, the payment could not be set off in the present action, for the reason that the plaintiff, who is seeking to recover money, does not owe the defendant the demand he makes, but it is due from another person, who never had any legal interest in the note declared on. To make a set-off available, the defendant must show that the plaintiff is legally liable to its payment, or else claims as assignee, or indorsee, in virtue of our statute, through some person on whom such a liability rests. In the case before us such a pretence cannot be made, nor was it attempted to be shown that the proceeds of the defendant’s note, when collected, were to be paid to Joseph M. Bullock.

The bill of exceptions does not show that there was any effort at the trial to prove a fraud on the part of the plaintiff in taking the note. His silence at the time it was given does not lead to such a conclusion, for he may not have been informed whether the notes in which defendant was surety had been paid, and consequently could not have answered the question which defendant then proposed to the witness. The case then, as presented by the bill of exceptions, shows a fair transaction, viz: a new promise by the defendant to pay the plaintiff a debt which the former owed a third person, and of which the plaintiff was the assignee. In this view the evidence to establish the set-off was properly rejected—and the judgment is therefore affirmed.

McKENZIE v. JACKSON.

1. M. & G. being partners dissolved, and M. & A. covenanted with G. on receiving the goods and effects of the old firm to discharge its debts, and also to pay certain debts which G. owed individually, among which was a debt due J. which M. by parol afterwards promised J. to pay him.—*Held*, that this was an original undertaking and not a promise to pay the debt of another within the statute of frauds, and that the agreement between M. & A. & G. by which the former covenanted to pay the debt to J. is merely the inducement to the promise upon which the action is founded.
2. When a party pleads specially facts which may be given in evidence under the general issue which is also pleaded, if the Court should erroneously sustain a demurrer to the plea the judgment will not be reversed for that cause as no injury is caused thereby.
3. When M. in consideration of effects placed in his hands by G. promises J. to pay him a debt which G. owes him, and by repeated promises induces him to delay its collection for several years, having had ample time to ascertain the sufficiency of the fund in his hands, he will not afterwards be permitted to resist a recovery on the ground of the failure of the fund which was the consideration of the promise.

ERROR to the Circuit Court of Tallapoosa.

This was an action of assumpsit. The first count of the declaration alledged that the defendant and one Gerald being partners in trade, dissolved the firm, and that the defendant and one Adams received the stock of goods, and all the debts and effects of the firm, and covenanted, on the 10th May, 1838, with him to pay all the debts the firm owed, and also certain debts which Gerald owed individually, of all which a schedule was annexed, and among which was the debt due the plaintiff—and that in consideration of the transfer of the stock of goods, &c. by Gerald, the defendant promised the plaintiff to pay the debt, &c.

The second and third counts are substantially the same as the first, to which is added the common counts.

The plaintiff took a judgment by default, which the Court set aside, on condition that the defendant should plead to the merits of the cause.

The defendant then offered to demur to the several counts of

the declaration which the Court, under the condition upon which the judgment by default was set aside, refused to receive, and thereupon the defendant pleaded non-assumpsit, set-off and payment, upon which issues in fact were taken, and three special pleas to which the plaintiff demurred, and which the Court sustained, but which need not be here described, as they are set out in the opinion of the Court.

The plaintiff proved and read in evidence the agreement between the defendant and Adams and Gerald, by which the former covenanted with the latter to pay the debt now sued for, dated 10th May, 1838—also the following letter from the defendant to the plaintiff:

Tallassee, 21 January, 1842.

Dear Sir—Yours of the 12th instant is just received and contents noticed. The information which you received at Wetumpka is not correct. I have not sold a bag of my present crop of cotton. I did sell, in November last, a few bags of my last year's crop. I have not got all my present crop prepared for market. So soon as I can get hold of money I will pay you all or part of the claim which you have, after deducting the discounts which I have against it. Of this you may rest assured, there is no man more willing and anxious than I am to pay his debts. I am using every industry to pay mine, and I am in hope it will not be long before I can say I owe no man. Be pleased to extend a little more indulgence to me, and as soon as I can I will attend to this matter.

Respectfully, yours,

JOHN MCKENZIE.

Gen. C. M. Jackson.

It was also proved that the defendant owed the plaintiff no other debt than the one sued for—that he repeatedly promised verbally, to pay it, and requested the plaintiff and his relations to deal in his store on that account—which they did. That suit was delayed one term on his promise to settle, and that he never refused to pay the debt until about six weeks before the trial of the cause, when, in a conversation with the plaintiff, he objected to paying, alledging that he had been injured by Gerald to the amount of \$1700, by off-sets and discounts made by persons owing the notes and accounts received from Gerald. It was also proved that the effects received by the defendant

McKenzie v. Jackson.

and Adams exceeded by ten thousand dollars the amount they were bound to pay—which being all the evidence, the defendant demurred thereto, and the plaintiff joining in the demurrer the court rendered judgment for the plaintiffs from which the defendant prosecutes this writ and assigns for error :

1. Rejecting the demurrer to the special counts of the declaration.
2. Sustaining the demurrer to the first, fourth and fifth pleas.
3. The judgment on the demurrer to the evidence.

CRABB & COCHRAN, for plaintiff in error.

GOLDTHWAITE, contra, cited 3 Stewart, 185, 172; 4 Cowen 432; 1 East, 192; 9th Porter, 552.

ORMOND, J.—Nearly all the questions of law presented upon this record depend upon the fact whether the promise upon which this action is founded is within the statute of frauds or not, and to the solution of that question we will first address ourselves.

The facts are, that one Pearly S. Gerald and the defendant below were partners in trade and agreed upon a dissolution, by which the defendant and one Adams became entitled to the stock in trade, debts of the firm, &c. and covenanted with Gerald to discharge the debts of the old firm, and certain individual debts of Gerald, of which a schedule is given. Among the debts of the latter class is the one sued for, the declaration alledging a subsequent promise on the part of the defendant to the plaintiff, in consideration of the transfer by Gerald of the stock of goods, debts, &c.

Among the many efforts to establish certain rules by which to ascertain whether a promise to pay the debt of another was within the statute of frauds, it has been frequently considered that the fact that the original debtor still remained liable was a certain criterion. A multitude of causes might be cited in support of this position; it is only necessary to refer to the cases of *Anderson v. Hayman*, 1 H. B. 120; *Matson v. Wharam*, 2 D. and E. 80, and *Jackson v. Rayner*, 12th John. 291, to show

McKenzie v. Jackson.

the supposed universal application of this principle. The rule however must, in its application, be confined to those cases where the promise of the party sought to be charged is made at the same time with the promise of the party held liable. As, if A. should say to B. let C. have goods and I will pay for them, if the goods are furnished and C. is held responsible to the vendor, the promise of A. is collateral and within the statute. The case of *Rhodes v. Leeds*, (3 Stew. and Por. 212,) is expressly in point, to show that in such a case, if the credit is given to A. and C. is not trusted or looked to for payment, the promise is not within the statute, and the books are full of similar cases.

Where the promise to pay the debt of another then subsisting, arises out of some new consideration of benefit to the promissor or harm to the promisee, it is not within the statute. This is the third class of Chancellor Kent, in his analysis of the statute in the case of *Leonard v. Vredenburg*, [8th John. 39,] which he holds to be without the statute. Upon this principle was decided the cases of *Williams v. Leiper*, 3d Burrows, 1886; *Gold & Sill v. Philips*, 10th John. 412; *Slingerland v. Morse*, 7 ib. 463; and *Read v. Nash*, 1 Wilson, 305. The same principle is affirmed by this Court in *Tompkins v. Smith*, 3 Stew. and Porter, 54. In *Farley v. Cleveland*, [4th Cowen, 432,] the facts were that one Moore owed Farley a sum of money for which he held his note, and upon Moore delivering to Cleveland hay of sufficient value to discharge the note he promised Moore to pay the amount to Farley, and some time afterwards, by parol, promised Farley to pay it to him. The Court held it not to be a case within the statute.

The last case is almost identical with the one under consideration. Here Adams and McKenzie promised Gerald to pay the debt which the latter owed to Jackson, in consideration of receiving the effects of the former firm, which are transferred to them, and subsequently McKenzie, by parol promises Jackson to pay him, and solicits indulgence. If Gerald, instead of transferring merchandize and debts on other persons, had handed over to McKenzie the amount in money, with directions to pay it to Jackson, it cannot be doubted that the person receiving it would be liable on his promise to him, and yet there can be no difference in principle between the two cases.

McKenzie v. Jackson.

The cases of Neilson v. Blight, 1 Johnson's Cases, 205, of Hale v. Marston, 17th Mass. 575, and of Hitchcock v. Lukins & Son, 8th Porter, 333, are express to this point and decisive of the case in this aspect. We are quite clear in the opinion that the statute of frauds interposes no bar to a recovery.

The three first counts of the declaration set out the agreement entered into between Gerald and the defendant, and aver that in consideration of the agreement so entered into, and of the transfer of the effects of the firm of McKenzie & Gerald, the defendant undertook and promised the plaintiff to pay the amount due to him from Gerald. There is a slight variance in the counts, but this is the substance of all, to which is added the common counts. To each of the counts of the declaration the defendant demurred, but the Court refused to permit the demurrers to be filed, upon the ground that a judgment by default taken by the plaintiff, had been set aside on condition that the defendant should try the cause upon its merits and abandon all dilatory pleas.

As, in this State, all demurrers are by statute to have only the effect of general demurrers, it may well be doubted whether a general demurrer, which reaches only matter of substance can be considered a dilatory plea. It is, however, unnecessary to consider this matter further, because we are clearly of opinion that all the counts of the declaration are substantially good and disclose a sufficient cause of action, and no injury was done by the judgment of the Court refusing to receive the demurrers as they must have been overruled if received.

The agreement entered into by the defendant and Gerald, by which the former agreed with the latter to pay the debt now sued for, is merely recited as the inducement to the promise made to the plaintiff and not as the foundation or ground of the action, which is the promise made upon the consideration recited in the agreement. This precise point was determined in the case of Hitchcock v. Lukins, [8th Porter, 333,] and also in Baird & Briggs v. Blagrove, [1 Wash. 170,] and upon the ground that the instrument under seal was only stated as inducement to that which forms the real ground of the consideration. [See also Arnold v. Hickman, 6th Mun. 15.] It may be true that the plaintiff can maintain no action on the agreement between the defendant and Gerald, as he is

McKenzie v. Jackson.

no party to it, but it by no means follows that he may not derive a benefit from it.

We proceed to the consideration of the pleas to which the plaintiff's demurrer was sustained. The third plea sets out the contract and pleads the statute of frauds. Independent of all other objections to this plea, it is a sufficient answer to it that it has been shown that the promise of the defendant is not within the statute of frauds.

The fourth plea recites the agreement between McKenzie and Gerald, and insists that thereby a liability was created in favor of Gerald and not in favor of the plaintiff. The obvious answer to this plea is that it consists not of fact but of matter of law and does not answer the declaration, which is founded not on the agreement between McKenzie and Adams with Gerald, but upon the promise of the former to the plaintiff.

The substance of the 5th plea is that the notes and accounts transferred by Gerald had been reduced by off-sets against Gerald and by payments to him previous to the transfer, to about the sum of three thousand dollars, that Gerald represented the notes and accounts, at the time the agreement was entered into as due and unpaid, that the defendant and Adams had fully accounted with Gerald, by paying all the other demands which they agreed to pay, and that therefore the consideration has failed.

We do not consider it necessary to examine into the legal sufficiency of this plea, because the parties went before the jury upon several issues in fact, among which was the plea of *non assumpsit*, under which plea all the evidence would have been admissible which could have been received under this special plea, if an issue to the jury had been taken on it. And in point of fact the statements of the defendant as to the deficiency of the funds received by virtue of the agreement with Gerald, occasioned by off-sets against and payments to the latter before the agreement was entered into, were given in evidence. No injury theretofore has accrued to the defendant by the judgment of the Court if wrong.

We proceed to consider finally the propriety of the judgment of the Court on the demurrer to the evidence.

Leaving out of view, as it is somewhat ambiguous, the letter of the defendant to the plaintiff, promising to pay the debt

McKenzie v. Jackson.

and asking indulgence, the proof was that after the defendant and Adams made the agreement with Gerald, they continued the business in Montgomery, and the defendant assured the witness that the claim due the plaintiff should be paid to him, pursuant to the agreement entered into with Gerald, and requested the plaintiff and his relations to deal in the store, on account of the claim, which they did. That the claim was placed in the hands of a lawyer for collection, and suit delayed one term upon the promise of the defendant to settle it, which promises were repeatedly made, and the justice of the claim never denied by the defendant until about six weeks before the trial of the cause, when, in a conversation with the plaintiff the defendant objected to paying the debt, alledging he had been injured by Gerald some seventeen hundred dollars, by reason of off-sets and discounts made to the claims in his hands against Gerald. It was also proved that at the time of the transfer of the goods and choses in action to McKenzie and Adams, it was estimated that the effects transferred exceeded the debts which McKenzie and Adams agreed to pay about ten thousand dollars.

The promise by the defendant to pay the plaintiff the amount of the debt due originally from Gerald to the plaintiff is clearly established and the only question which could possibly arise, is the fact which appears to have been received in evidence from the statement of the defendant that there was a deficiency in the assets received from Gerald, which constituted the consideration of the promise to the plaintiff. However valid such an objection might be if seasonably urged, it cannot avail under the circumstances of this case. The repeated promises of the defendant, made with the opportunity of full knowledge of all the facts are obligatory upon him. It might, and in all probability would, operate most injuriously upon the plaintiff, if, after having been lulled into a false security, for so many years, by the repeated promises of the defendant, and the delays in the collection of the debt consequent thereon, he should now be permitted to alledge a failure of the fund from which the payment was to be made—the objection comes too late.

We are therefore of opinion that the judgment of the Court below on the demurrer to the evidence is correct, and there being no error in the judgment of the Court it is affirmed.

SANDFORD & CLEVELAND v. SPENCE.

1. It is not a sufficient cause to suppress a deposition that the certificate of the commissioner omits to show that it was taken within the hours named in the commission—reciting that pursuant to the commission the witness was caused to come before the commissioner on the day named in the commission.

WRIT of Error to the Circuit Court of Mobile county.

The defendant in the Court below objected to the reading of the deposition of a witness, because the certificate of the commissioner omitted to state the hours between which the commission was executed. The commission directed the witness to be examined at the office of the commissioner, in the town of Huntsville, on the 15th day of October, between the hours of 9 A. M. and 4 P. M. The certificate of the commissioner recited that, pursuant to the annexed commission, he had caused the witness to come before him at his office, in the town of Huntsville, on the 15th day of October; but it is entirely silent with respect to the hour when the examination commenced or concluded. The deposition was admitted, and the defendant excepted.

CAMPBELL, for the plaintiff in error cited 3 East, 440; Bell v. Morrison, 1 Peters, 351; Campbell v. Woodcock, 2 Ala. Rep. 41; Ulmer v. Austil, 9 Porter, 157; Kean v. Newall, 1 Missouri Dec. 751.

STEWART, contra.

GOLDTHWAITE, J.—It may be conceded that when a deposition is sought to be used in evidence, it is necessary for the party offering it to show a strict compliance with the statutes; but we think this concession does not authorize so strict a scrutiny as is asked for in the present case. Here the commissioner is required to examine the witness between the hours of nine and four of a particular day, and his certificate shows

Croft v. Topp.

that, pursuant to the commission, the examination was had on that day. We are at a loss to see how the execution could be pursuant to the authority, unless it was within those hours, and we are not authorized to falsify what is stated, by the omission to state something more.

Our conclusion is that the certificate shows an examination pursuant to the commission, and it would be a very strained construction to infer that the witness was examined at a time not warranted.

Doubtless it would be competent, on the motion to suppress the deposition, for a party to show that he attended at the hours named, and that no examination was then had—but in the present case there is nothing to relieve the motion from its appearance of undue technicality, and it was properly refused.

Let the judgment be affirmed.

CROFT v. TOPP.

1. To recover upon a decree rendered in a sister State in favor of infant wards, who there sued by their guardian, an action should be prosecuted in this State in the name of the wards as legal plaintiffs, and not by the guardian, merely describing himself as such on the record.

WRIT of Error to the Circuit Court of Greene.

This was an action of debt on the exemplification of a decree of the Court of Chancery, holden in the county of Giles in the State of Tennessee. The decree recited in the declaration is in favor of the plaintiff, as guardian of Virginia Meredith and Mary Meredith. To the declaration the defendant demurred, and his demurrer was overruled—thereupon he pleaded *nul tiel* record, and issue being taken thereon the cause was submitted to the Court for trial. To sustain the issue on

Croft v. Topp.

his part, the plaintiff offered the exemplification of the record of a decree in a Chancery suit rendered in the Court above referred to. From this transcript it appears that the bill was filed in the name of Virginia Meredith and Mary Meredith, by their guardian, Dickson C. Topp, and that the decree is in favor of the complainant. The defendant objected to the exemplification as evidence because it did not show a decree in favor of the plaintiff, as alledged in his declaration, and was therefore insufficient to charge the defendant—but his objection was overruled and the transcript adjudged sufficient.

JONES, with whom was MURPHY, for the plaintiff in error.
J. B. CLARKE, for the defendant.

COLLIER, C. J.—The action upon the exemplification should certainly be prosecuted in the name of the parties in whose favor the decree was rendered; for it is a debt due them as much as if the defendant had obliged himself to pay them *eo nomine*, a certain sum of money. It is well settled that the party in whom the legal right is vested, must sue at law, and this although what may be recovered will go into the hands of another person. Thus in *McLeod v. Mason*, [5 Porter's Rep. 223,] where one guardian had resigned and another been appointed in his stead, upon a settlement with the Orphans' Court of the accounts of the former, it was held that the decree for what was ascertained to be due to the wards, should be in their favor, and not in favor of their guardian (the successor) as such. So in *Sutherland v. Goff*, [Ib. 508,] it was determined where the matter lies in action, the suit must be in the name of the ward. [See also 6 Porter's Rep. 9; 2 Ala. Rep. 406.] These cases are decisive to show that for the recovery of a debt due to infants, who are in wardship, the action must be sued in their name by their guardian, and not in the name of the guardian, although he may describe himself as such on the record. This being the law, it will follow, that to let in the exemplification as proof, the suit should have been brought in the name of the plaintiff's wards, and not in his own name.

In determining the law to be otherwise, the Circuit Court erred—its judgment is consequently reversed and the cause remanded, if the defendant in error desire it.

OLIVER v. LOFTIN.

1. Any action of the County Court upon a road as a public road as by taking an order in reference to it, is *prima facie* evidence that it is a public road established by law.
2. If a change is made in a public road, and acquiesced in by the public, an overseer of the road would not be authorized to abate it as a nuisance. But when the change is recent, and not justified for the purpose of making it more straight, or more convenient for the public, any one may abate it as a nuisance, and it would be the duty of the overseer of the road to remove the obstruction.

ERROR to the Circuit Court of Montgomery.

This was an action of trespass *quare clausum fregit*, by the plaintiff against the defendant in error. The defence was that the supposed trespass was committed by the defendant, as an overseer of the road, removing a fence which the plaintiff had placed across it a short time previously.

The defendant, to prove that the road was established as a public highway, introduced as evidence a transcript of the record, certified by the Clerk of the County Court of Montgomery as follows:

State of Alabama—Montgomery county:

Commissioners Court of Roads and Revenue, held for the county aforesaid, at the Court House, in the town of Montgomery, on the third Monday of February, 1831—Present, Nimrod E. Benson, Judge, and William Wright, Redick Jones, Absalom Evans, and Wade Allen, Commissioners:

Ordered, by the Court, that the road leading from Judkin's ferry to Crommelin's ferry, be and the same is, declared to be a public highway, as the jury of review has laid out and marked the same, and to be of the third grade.

The Clerk of the County Court was also introduced and proved that this was all which remained of record of said road, that he knew of no papers connected with this road, and did not think there were any, but could not say that he had diligently examined for such.

To the introduction of the record the plaintiff objected, because it was not shown by the records that commissioners had been appointed to lay out the road, or that they had done it, or had made a report indicating the route, &c., which objection the Court overruled.

The defendant then offered to prove by a witness that he was one of the jury who laid out and viewed the road—that he had been served with a paper purporting to emanate from the County Court, authorizing him and others to review the route for the said road, but what had become of the paper he could not say—that at the time the road was reviewed and located, the land on which the trespass is alledged to have been committed belonged to one Weaver, upon which was a field through which the road was indicated to run, but that the overseer who opened it, diverted the road to the left, so as to run outside of and along the fence, where it remained some time and until the owner again removed his line of fence still more to the left and across the road as opened. Under which condition of things the plaintiff became the owner, a way having been opened by travellers or otherwise around and along the fence on the outside, which continued to be travelled for several years. That a few days previous to the working on the road the plaintiff had removed the fence still more to the left, and thrown it across the road so formed, the pulling down of which was the trespass complained of.

This testimony was objected to by the plaintiff, because it was not shown that the jury acted under an order of Court, or had made a report which was accepted by the Court, but the Court overruled the objection.

The counsel for the plaintiff moved the Court to instruct the jury that if they believed the defendant had committed a trespass as alledged on the land of the plaintiff where there was not a public road lawfully established by the Commissioners Court of Montgomery county that the plaintiff was entitled to recover.

This instruction the Court refused, and charged the jury that if the road had been laid out to run through the field and had been opened by the overseer to the left of the fence and acquiesced in by the owner, and he had then moved his fence across

Oliver v. Loftin.

the road and one had again been opened by travellers, or otherwise, around the fence so moved and remained for several years as the travelled road, and the plaintiff had then recently thrown his fence across it, the overseer was justified in taking down the fence to open the road—to all which the plaintiff excepted, and now assigns as error.

PRYOR, for plaintiff in error.

HARRIS, contra.

ORMOND, J.—The motion for instructions to the jury appears to be founded on the assumption that no road can be legally established unless the order appointing commissioners to review the road, the report made by them indicating its route, and the final order establishing it were of record in the County Court.

It is not necessary now to determine whether, when a road has been established by the Commissioners Court from one point to another, the route of the road through the intermediate space, would not be sufficiently shown by proof of where the road actually ran, its *user* by the public, and the acquiescence in such use by the owners of the land lying in its route, because, in our opinion, the act of 23d December, 1836, [Meek's Sup. 310,] was intended to foreclose this inquiry, and to supply the precise difficulty supposed to exist in this case.

The first section declares, "that any order of the Commissioners' Court, by which a road is *recognized* as a public road shall in all cases be *prima facie* evidence of that fact;" that is that such road has been established as a public road according to law.

The design of such law was clearly to legalize such roads as had been established by the Commissioners' Court in an informal manner, or where the evidence of such establishment could not be produced. Therefore any action of the Court upon the road, as a public road, by making an order in reference to it, is made *prima facie* evidence that it is a public road, established by law. In this case the road was established by the County Court, and parol testimony is certainly admissible to prove its location, by shewing where it actually ran.

The charge given is unexceptionable. The act just referred

Herndon v. Forney et al.

to, section five, authorizes any one to change the route of the road "to straiten it through enclosures or to make it more convenient to the public;" from this license it will follow, that if a change is made by any one in the route of the road, and acquiesced in by the public, as appears to have been the fact in this case as regards the first alteration, the overseer of the road could not abate it as a nuisance. But when the change was recent, and not justified for the purpose of straitening the road or making it more convenient for the public, any one might abate it as a nuisance, and it was the duty of the overseer of the road to remove such obstruction, and restore the road to its proper condition.

Let the judgment be affirmed.

HERNDON v. FORNEY ET AL.

1. The plaintiff who sues on a penal bond may frame his declaration on the penal part of the bond, without assigning breaches, and such a declaration is not bad when a condition is shewn *oyer*. The proper course to compel an assignment of breaches, is to plead performance, or such other plea as will show a continuance of the condition.
2. The defendant in an attachment may have his action on the attachment bond without having ascertained his damages by a direct action on the case against the plaintiff in the attachment.

WRIT of Error to the Circuit Court of St. Clair county.

Action of debt on bond. The declaration consists of a single count for the penalty. The defendant craved *oyer* of the bond and its condition, which being given, it appears to be an attachment bond with the condition to be void if the plaintiff in the attachment should prosecute his suit to effect and pay and satisfy the defendant all such costs and damages as he might sustain by the wrongful or vexatious suing out of

the attachment. The defendants then demurred to the declaration, and the Court sustained the demurrer.

The plaintiff brings his writ of error to reverse this judgment.

CHILTON and **WALKER**, for the plaintiff in error, insisted that the demurrer was premature, if no other question was intended to be raised than that which relates to the plaintiff's right to sue without having first determined the liability of the plaintiff in the attachment. [*Davis v. Dickson*, 2 Stewart, 370; *Meakings et al v. Ochiltree*, 5 Porter, 395; 9 John. 507; 1 Wash. 367; 1 Munf. 501.]

In point of fact, however, the judgment of the Circuit Court was given upon the supposition that it was essential to show an ascertainment of the damages sustained, through the medium of a recovery in an action on the case against the plaintiff in the attachment.

This course of proceeding is considered to be unnecessary, as there is no sufficient reason why the recovery may not be had by suit on the bond in the first instance. Such a practice seems warranted by the statute, [*Meek's Sup.* 7, §1, 5,] and by decisions in analagous cases. [*Ball v. Garden*, 21 Wend. 270; *Governor v. White*, 4 S. and P. 441; *Thompson v. Searcy*, 6 Porter, 393.]

MOORE, contra, contended the judgment on the demurrer was proper, because no action can be maintained on the bond until the amount of damages is ascertained; until then there is no way in which the condition can be complied with. The right to maintain any action is dependent on a previous act to be done by the plaintiff.

It is doubtless true that the usual mode is to declare for the penalty of the bond, and thus put the defendant to his plea of performance, but there may be cases in which another plea than performance would be proper: as in the case of a bond conditioned to pay a sum of money after ten day's notice, from the obligee. Is it not apparent that as soon as this condition is shown on oyer, no cause of action appears until the notice is averred? If then, this illustration furnishes an exception to the general rule, it seems to involve the same principle as this

case, if it is necessary to ascertain the damages by a suit against the plaintiff in the attachment.

That this is necessary will appear by a careful collation of the several statutes prescribing the form and condition of bonds. [Aikin's Digest, 37, §3; ib. 38, §6; Meek's Sup. 7, §1, 5.]

GOLDTHWAITE, J.—1. The demurrer in this case was prematurely taken, because when the condition of the bond was set out on oyer, it showed a strict conformity with the statute, therefore the declaration for the penalty was proper, unless it was incumbent on the plaintiff in the first instance, to show some specific breach of the condition.

This is believed to be unnecessary, as the most approved authorities state the rule to be, that it is the privilege of the plaintiff, either to suggest breaches on the roll, or to declare for the penalty, and assign them in his replication to the plea of performance. [1 Wm's. Saund. 51.] Such also is the established practice in this Court. [Davis v. Dickson. 2 Stew. 370.]

Although the plea of performance is said to be the proper one to compel the plaintiff to assign the specific breaches on which he seeks a recovery, this must be considered merely as an illustration of the mode of pleading, as it will readily occur to any one that in those cases where the condition of the bond is to omit the doing of any act, the allegation of the omission will be equivalent to the assertion of a performance of the condition in other cases. So likewise if the forfeiture of the condition is to depend upon doing some act after notice from the obligee, as in the case of a condition to pay a sum of money upon notice, an averment in the plea that the notice was not given, will be equivalent to the usual averment of general performance in other cases.

The theory upon which the practice depends is, that the obligor, by the penal part of the bond, admits a debt presently due, and therefore it rests with him to show the continuance of the condition, upon which alone the penalty is deferred. And this applies equally to the cases of all bonds with negative or affirmative conditions.

This conclusion is sufficient to show that the judgment on

the demurrer is erroneous, because, when it was made, there had been no attempt to set out any breach of the condition, and therefore there was nothing before the Court but the bond, and its condition, both of which, as before observed, are in accordance with the statute. But as the question with respect to the right of the plaintiff to maintain the action on the bond, without first ascertaining his damages by an action on the case against the plaintiff in the attachment, has been fully argued, and as it must necessarily arise when the case is again tried, we shall proceed to express our opinion on that aspect of the case.

2. When the attachment law was revised in 1833, the whole was consolidated in one act, and in its third section the condition of the bond required to be given is prescribed. In the sixth section of the same a form is given of an attachment bond which sets out a condition materially different from that required by the previous section. It is the form of the bond set out which not only countenances the view of the defendants in this case, but actually provides as a part of the condition that the bond is only to become forfeit on the failure to pay such damages as shall be recovered against the plaintiff in the attachment in a suit to be brought after the determination of the attachment suit. Under ordinary circumstances there can be no doubt but the rules of construction would require the sixth section to be considered merely as a legislative exposition of the third; but in point of fact, these two sections were compiled from different statutes, previously in force, and under which different bonds and other proceedings were required. [See Laws of Ala. 11, 18.]

It might have been proper, if this enactment had remained unchanged, to have pursued the ordinary rules of construction, but the act of 1835 declares that no person shall sue out an attachment without entering into the bond prescribed by the third section of the act of 1833; and the latter act also directs that the surety shall be liable to all the liabilities of the principal in the bond. The effect of the act of 1835 upon that of 1833, was considered by us, in the case of *Alford v. Johnson*, [9 Porter, 320,] as not repealing the sixth section which gives the form of the bond. The subsequent act of 1837, modifies

the existing laws with respect to attachments in several important particulars, and was considered by us in *Lowe v. Derrick*, [9 Porter, 415,] as repealing the 6th section of the act of 1833. This act also prevents the defendant in the attachment from disputing the grounds of suing out the attachment, and expressly gives him the right to sue the plaintiff for wrongfully or vexatiously using this process, and this before the attachment is determined. [Meek's Sup. 8, §5.]

It will be seen that the act of 1835 makes the liability of the surety of the bond the same as that of the principal. If this language was intended to be applied to the bond itself, or any remedy on that, it is without any sensible meaning, for we cannot perceive how there could exist a distinction between different obligors, bound by the same bond. We are inclined to believe that the intention of this act, though imperfectly expressed, was to make the surety liable on his bond to the same extent, not exceeding the penalty of the bond, as the principal was to an action on the case. However this may be, we are clear that the Legislature intended to relieve the statute book from the influence of the sixth section of the act of 1833, and consequently to destroy its effect in construing the condition of the bond required to be entered into by the third section.

In addition to this, the inconveniences which, in many cases must result from requiring a suit against the plaintiff in the attachment to ascertain the damages before allowing a suit on the bond, would, in effect, be a denial of justice. Attachments may be, and frequently are, sued out by non residents and transient persons, whom it would be difficult and frequently impracticable to pursue to the places of their residence. It may be presumed too, that the inducements are greater to such persons to sue out this process than they are to those who are settled among us, and that it would be more frequently abused than if they were directly responsible to suits within the State. These considerations induce us to think that the Legislature intended to give the remedy on the bond in the first instance. Indeed, when all the objections against such a practice are fully examined, they are more technical than real, and it is just as easy to declare for a breach of the condition as it is in an action on the case for a wrongful prosecution. We forbear to express any opinion as to the precise manner in which

Shields et al v. Alston.

breaches might properly be assigned, as no question of that nature is before us.

For the reasons we have before stated, the judgment of the Circuit Court must be reversed and remanded.

SHIELDS ET AL V. ALSTON.

1. The statute is explicit in requiring the next of kin to be informed of an application for the probate of the will of a deceased relative, and only allows it to be heard and determined without notice, where there is no kindred resident in the State: and a revising Court will not intend that the next of kin are non-residents, in the absence of any statement or proof to that effect in the record.
2. The recital in the record in respect to the admission of a will to probate, that "due and proper notice was given to the next of kin of the testator," will not authorize the conclusion that one of the next of kin then in his minority, had been legally notified, or waived notice—there being no notice in the record, and he being incompetent to dispense with it.
3. Where a paper is propounded for probate as a will, and the parties interested in defeating it, produce a testamentary paper of a later date, it is the duty of the Orphans' Court, under the statute of this State, *mero motu* to cause proceedings to be instituted for the purpose of trying the validity of the latter, and determining whether it shall operate as the testator's will. And the Court cannot assume that the first paper has never been revoked, because the second has not been formally offered for probate.

On the 10th May, 1841, the defendant in error propounded for probate, to the Orphans' Court of Marengo, a paper purporting to be the last will and testament of Polly Glover, late of that county deceased, of which he was appointed executor. Thereupon citations were issued to John O. Glover, Benjamin G. Shields and Benjamin Glover—the former was returned "executed," and the two latter returned "not found." On the 24th of May, citations were again directed to issue for Shields and B. Glover, which were regularly served—at the same time Leroy W. King was appointed a guardian *ad litem* for certain infant children of J. O. and B. Glover, (mentioned

by name,) who were interested in the establishment of the will, and a citation directed to issue to him. In the record there is a waiver of service of citation by Nicholas W. Hobson, one of the legatees, as a guardian of his children and in right of his wife.

B. G. Shields and B. Glover appeared to contest the validity of the will sought to be admitted to probate; and thereupon an issue was submitted to a jury, who, by their verdict, declared that the paper propounded is the last will and testament of Polly Glover, deceased; and thereupon an order or decree was rendered that letters testamentary issue to the defendant in error, as executor, upon giving bond and taking the oath as prescribed by law. The entry recites that due and proper notice was given to the next of kin of Polly Glover, deceased, and the cause was regularly before the Court, &c.

On the day of trial, but before the same was entered upon, the contestants, by their agent, made an affidavit, setting forth with particularity, that they could prove by two absent witnesses, (whose names are mentioned,) that Mrs. Glover made another and a later will than that sought to be established. It was admitted by the defendant in error, that the absent witnesses would testify to the facts stated in the affidavit for the contestants, and the same was allowed to be read to the jury, instead of submitting to a continuance in order to obtain their personal attendance. Shields, in order to contest the paper offered for probate, proposed an issue in three distinct forms:

1. He denied that it was the last will and testament of Mrs. Glover.

2. He averred that since the time when the writing in question purports to have been executed, Mrs. Glover made and published and declared her last will and testament, and thereby revoked and annulled all other and former wills and testaments by her made, &c

3. He insists that the paper ought not to be admitted to probate, because he says that on the 22d April, 1841, Polly Glover made and executed a certain instrument in writing, in substance as follows:

[Here follows the copy of a testamentary paper, purporting to be made by Mrs. Glover, disposing of all her property and revoking all former wills.]

This writing is not signed by Mrs. G. in consequence of her inability to write her name, but she gave to it her sanction and assent in the presence of four persons, who attest the fact by subscribing their names as witnesses.

The Court overruled the issues tendered, on the ground that the writing offered by the defendant in error was the only paper that then was, or ever had been, before the Court, purporting to be the last will and testament of Polly Glover—and that the paper set up by Shields as a will, was not in Court or offered for probate according to the statute. To which decision the contestants excepted, &c.

The contestants then offered to read to the jury the depositions of the subscribing witnesses to the paper set up by Shields as the last will of Mrs. Glover, but the defendant in error objected to their admission on the ground that that writing purports to be the last will of the testator, and as it had not been offered for probate or legal notice given to the next of kin of the deceased, it was not competent for any person to use it as a mere revocation of a former will—but the parties who set it up were bound to file it for probate before it could operate as such. Thereupon the depositions were excluded, and the contestants excepted.

To revise the order or sentence of the Orphans' Court, the contestants have sued a writ of error to this Court.

MANNING, with whom was Mr. LYON, for the plaintiff in error. All the parties in interest should have been brought before the Orphans' Court, and its course of proceeding being summary, the record should show a compliance with the statutes under which it acted. [7 Potter's Rep. 274.] It is not enough that the entry recites that "due and proper notice," was given, &c. but it must be shown to whom, and when, it was given. [Minor's Rep. 25.]

It was irregular to appoint a guardian *ad litem* for some of the infants who are interested, and to summon him without notice to the infants themselves. [1 Ala. Rep. N. S. 396.]

The heirs of John Shields who appear to be interested in both the papers set up as wills, should have been brought before the Court.

The evidence offered to sustain the will set up by Shields

Shields et al v. Alston.

was competent and should have been received. If that will was not regularly offered for probate, it was the duty of the Court *mero motu* to have ordered it to be filed—to continue the cause, that the validity of both the papers might be examined and complete justice administered. The Orphans' Court proceeds *in rem* and takes cognizance of every case of testacy or intestacy, without waiting for its action to be specially sought. [Aik. Dig. 251-2; Wyman et al v. Campbell, 6 Porter's Rep. 232.]

The issues in the form tendered by B. G. Shields, should have been received and submitted to the jury.

It cannot be objected that the paper set up by the contestants was invalid as a will of the personalty, whether it may be under the statute of frauds a will of land, is another question. A writing, purporting to be a will of real and personal estate, but defectively executed as to the former, is nevertheless good as to the latter. [2 Ves. Rep. 665; McGrew v. McGrew, 1 S. and P. Rep. 30.] And such is the law notwithstanding there be a previous will disposing of both the real and personal property. [2 Ves. Rep. 665; Cogbill v. Cogbill, 2 Hen. & Munf. Rep. 510.]

MURPHY and W. G. JONES, for the defendant. Our statutes which relate to the contestation of wills are found in Aik. Dig. 249, 177, 250, 449, 450, and do not require that the record should show that all the parties in interest were before the Court. It will be presumed, if the reverse do not appear, that the proper parties were cited. [McGrew v. McGrew, 1 Stew. and P. Rep. 30.] Citation is unnecessary if it appear that the parties in interest have had notice. [Aik. Dig. 251, §29.] The recital in the record states that "due and proper notice had been given to the next of kin," and also that citations had been served on the legatees.

The paper offered by the contestants as a will, was attempted to be used merely as a revocation of that offered for probate, but not being executed in conformity to law, it could not thus operate, and was on this ground properly rejected. [Laugh-ton v. Atkins, 1 Pick. Rep. 535; Reid et ux v. Borland, 14 Mass. Rep. 208; Onions v. Tyrer, 1 P. Wm's Rep. 343; 1 Wm's Ex. 81; 3 Starkie's Ev. 1713, and cases there cited.]

As to the issues tendered by Shields, they were so far as legal, substantially embraced by the issue that was tried, and their rejection, even if an error at all, was entirely harmless, and cannot here avail.

In England wills are proved in common form, or in solemn form *per testes*. In the former no citation to the next of kin is necessary—in the latter it is essential. [1 Wm's Ex. 188.] As to the effect of proving when all the next of kin are not cited, and how and by what tribunal it may be revoked. [See 1 Wm's Ex. 194; ib. 347, 358, 359, 360.] If notice was not given to all the proper parties, it may be an error in fact, for which probate may be revoked, but the order cant be here reversed.

The Orphans' Court should not *mero motu* proceed in every case of testacy or intestacy which may occur in the county, but only when applied in the manner prescribed by statute; and as the paper set up as the last will was not propounded for probate, the Court should not have directed it to be filed, that its validity might be examined.

COLLIER, C. J.—By the eighth section of the act of June, 1821, it is enacted, that on application for the probate of any will, the Clerk of the County Court shall issue a citation, requiring the sheriff to summon the widow or next of kin of the deceased to appear at some return day in the process named, (or appear at the next stated session,) and show if they have any thing to alledge against such application, &c., or on satisfactory proof that the deceased has no widow or kindred resident in the State, the application may be heard and determined; the Court at any stated session may hear and determine such application though no citations may have been executed or issued, on proof of reasonable notice thereof, or on proof that the deceased has no widow or kindred resident in the State.

This enactment is very explicit in its terms in requiring the next of kin to be informed of the application for the probate of the will of a deceased relative, and only permits it to be heard and determined without notice when there is no kindred resident in the State.

It is inferrable from the record that the testatrix had kin-

dred who were not brought before the Court by citation, who in the event of its being adjudged, that she died intestate, would be entitled to share in the property she left. Without attempting particularly to designate them all, it may be sufficient to mention the father and mother of her deceased grand-son, John J. Shields, if living, and if they were dead then William, the son of John J. Shields, as one of the next of kin. It does not appear that this party resides without the State; and such cannot be intended to be the fact in the absence of a statement or proof to that effect in the record, so that although the application for the probate may have been determined at a "stated session" of the Court, yet the omission to serve him with a citation would be fatal to the proceeding. The recital in the order of the Court below, that "due and proper notice was given to the next of kin of Polly Glover, deceased," does not warrant the conclusion that William Shields was duly notified, or waived notice. The record contains no citation that was served on him; and being in his minority he could not dispense with the legal mode of being brought before the Court.

Whether the children of John O. Glover and Ben. Glover, should be regarded as of the next of kin to the testatrix, within the meaning of the act cited, as their parents were more nearly related is a question which need not be considered. But if they were necessary parties in analogy to the course of proceeding in Chancery, it would seem that they should have been first served with citation before a guardian *ad litem* was appointed. [Walker et al v. Hallett, 1 Ala. Rep. 379.]

2. The granting of letters testamentary and of administration pertains to the County Court sitting as an Orphans' Court, or Court of Probate. [Act of 1806, Aik. Dig. 248-9.] And the Judge of that Court is invested with jurisdiction, within his county, *either in open Court or in vacation* to take the probate of wills, grant and repeal letters testamentary and letters of administration, &c. [Ib. 251. "If any of said Judges shall be informed that any will, whereof he is competent to take the probate, is in possession of any person, such Judge may order a citation to issue, returnable as in other cases, requiring the person so charged, and all others who may have possession of such will, to produce the same before him, at or before the re-

Shields et al v. Alston.

turn day of such process; and on its being duly certified by proof, that any person or persons on whom such process has been executed, conceals, or improperly delays to produce such will, such Judge may commit him, her or them to jail, to remain in custody until the will shall be produced, and may make such other orders as may seem necessary in the case." [Aik. Dig. 252; see also ib. 450.] *Further*, before issuing letters testamentary, the Judge shall administer to the executor or executrix an oath, as follows, viz: "You swear that the writing which has been admitted to be recorded as the last will of ——— contains the true last will of ———," &c. [Aikin's Dig. 177.]

These several statutes clearly show, that the Orphans' Court is authorized to exercise a very extensive jurisdiction over the estates of deceased persons; that the Judge thereof may either in open Court or vacation, take the probate of wills, and grant or repeal letters testamentary. He may also coerce the production of a will of which he is competent to take the probate. This being the case, it would be strange if he could not *mero motu*, subject to judicial action a will which was brought before his Court without compulsory process, unless he was asked to permit it to be proved. The very object of requiring its production, is to ascertain its validity and cause it to be executed, if it was the last legal expression of the intentions of the deceased.

When, then, a will is exhibited to the Orphans' Court bearing a later date than one which is offered for probate, and contended to be the last will of the testator, it is the duty of the Court to pause and require a contestation of the facts, that it may be understandingly determined which should be established. The Court is not obliged to remain quiescent, for it is provided by statute, that when the validity of any will shall be contested, or doubts may arise as to its validity, or as to any fact which, in the opinion of the Judge, it may be necessary to have ascertained by the verdict of a jury, before awarding any order, judgment or decree, such Judge, at any stated session, or on any sitting held in vacation, may forthwith cause a jury to be summoned and empannelled to try such issue, or inquire of such facts as, under his direction, shall be submitted to their decision. [Aik. Dig. 251.] Besides, although the executor

might believe that the will of the earliest date was operative, the Judge should not administer to him the oath prescribed by statute, until the validity of the last was tried.

It is not necessary to a decision of the present case to consider whether the will set up by the plaintiffs in error, operated a revocation of the first as it respected the lauds of the testatrix; since it is settled that a will which disposes of the real and personal estate may be good as to the personalty, though it is not executed so as to pass the realty. [McGrew v. McGrew, 1 Stew. and P. Rep. 30; see also 2 H. and Mun. Rep. 506; 4 Ves. Jr. Rep. 200, notes A. and B.; 1 Pick. Rep. 239; 4 Whea. Rep. 91, note; 1 Call's Rep. 479; 1 Bro. Ch. Rep. 147; 2 Ves. Jr. 665; Toller's Ex. 379; 1 Cox's Ch. Rep. 240; Roberts on Frauds, 327, 362; 2 Ld. Raym. Rep. 1282; Comyn's Rep. 453; 1 Eq. Cases Ab. 408; 1 Roberts on Wills, 151.] Nor is it essential to a will of personal property, that it should be signed or sealed by the testator and attested by subscribing witnesses; although it be written by another, if shown to have been approved by him, or written agreeably to his instructions, it is entirely sufficient. [1 John. Ch. Rep. 153; 1 Call's Rep. 479; 1 Dall. 266, 286; 1 Roberts on Wills, 27, 28, 148, 150-1-2-6; Toller's Ex. 3, 14, 58; Comyn's Rep. 452; 2 Bla. Com. 501-2 and note; 2 Nott and McC. Rep. 531; 1 Merivale's Rep. 501.]

We might here close this opinion, but as the defendant in error insists that *Laughton v. Atkins* [1 Pick. Rep. 535,] leads to a different conclusion than that we have attained, we will give to it a brief consideration. That was an appeal from a decree of the Judge of Probate approving an instrument dated in 1819, as the last will and testament of Sarah Badger. The main ground of appeal was, that in 1821, the testatrix, by an instrument duly executed by her, cancelled and revoked the writing established as her will. It appeared that the instrument of 1821, purported to be a disposition of all the real and personal estate of the testatrix, and in express words revoked all former wills—that it had never been approved as a will, but on the contrary upon being offered for probate was adjudged null and void, because it was procured by undue influence and persuasions, and false representations of the appellee's conduct. The Court held that the decree against the validity of the instrument of 1821 was conclusive; that being inopera-

tive for the primary object, viz: to dispose of property it was ineffectual as a revocation, which was a secondary purpose, because it could not be known that the testator intended to revoke the will of 1819 unless that of 1821 was allowed. It was admitted that there are cases where a will is inoperative from circumstances *dehors*, it may notwithstanding be set up as a revocation; as where the legatee is incapable of taking. The Court thought it competent to prove a will in part and disallow it as to the residue; and that an instrument purporting to be a will with a clause of revocation could not be offered in evidence as a revocation only, without a probate; though it was questionable whether a probate is necessary to an instrument purporting to be only a revocation.

It may be conceded that the case cited might be regarded as a correct exposition of the law in this State, without at all conflicting with the view which we have taken. It does not determine that a Court of Probate would not, where an application is made to establish an instrument as a will, inquire into the validity of one of a later date, which is produced to furnish a reason why the former should be disallowed; but merely that a decision adverse to the latter would prevent it from operating as a revocation. We hold, that upon the production of the last instrument, our statutes require that the Court should have directed proceedings to be had with the view to ascertain whether it was the last will and testament of the testatrix. If the case in Pickering maintained a doctrine the opposite of that, which seems to us to result from our legislative acts, we should feel indisposed to conform to it, but as it does not conflict with our reasoning or conclusion it is unnecessary to consider it farther.

Other questions of a minor import were made in argument, but we deem it unnecessary to consider them—and have merely to add that the order or decree of the Orphans' Court is reversed and the cause remanded.

BOUGHTON v. SPEAR & PATTISON.

1. The sheriff returned on the writ "not executed, by order of the attorney,"—Held, that proof that the defendant accepted service of the writ, was sufficient evidence that he had notice that the suit was pending, and to authorize the Court to render judgment.

Error to the Circuit Court of Barbour.

Assumpsit by the defendants against the plaintiff in error, and another, as to whom the cause was discontinued. The sheriff returned on the writ, "not executed, by order of the attorney."

The judgment of the Court is, "Came the plaintiffs and discontinued as to Battle, who was not served with process, and proves acceptance by Boughton, who made default. It is therefore considered," &c.

The assignments of error are—

1. That the judgment was rendered by default without service of process.
2. That there is a variance between the note as set out in the original writ and the declaration.

LEWIS, for the plaintiff in error.

CRAWFORD, contra.

ORMOND, J.—In *Rowan v. Wallace*, [7th Porter, 171,] we held that a return by a sheriff on the writ, "service acknowledged," was sufficient. That case does not in principle differ from this. It is certainly as satisfactory evidence that the defendant had notice that the suit was pending, where proof is made of the fact to the Court as when the sheriff merely returns the same fact on the writ. The proof is indeed of the same quality.

Nor is there any discrepancy between the return of the sheriff and the proof thus made. The indorsement on the writ only shows that the plaintiff waived a strict execution of the

McCain v. Wood.

writ, which is entirely consistent with the acceptance by the defendant, or waiver of strict service.

If the indorsement on the writ could be looked to for the purpose of reversing a cause, it certainly cannot be taken advantage of by the defendant in this case, who was in default.

Let the judgment be affirmed.

McCAIN v. WOOD.

1. The act of 1840, [Meek's Sup. 102,] authorizing the mode of proceeding upon the answer of a garnishee, extends to garnishee process upon judgments as well as original and judicial attachments.
2. The act of 1828, [Digest 208, §5,] which avoids all deeds of trust of personal property as against creditors and subsequent purchasers, unless recorded within thirty days, does not extend to a deed of trust assigning choses in action as security for a debt.
3. A deed assigning "all debts due to the grantor from persons in the State of Alabama for medical services," without any schedule of names or sums, is not void for uncertainty.
4. When a deed of trust expresses a legal consideration, it is not void *per se* because the amount of debts, &c. assigned by it is not set out or the names of the debtors specified.
5. When the contest is between a creditor and a grantee of a trust deed to secure another creditor, the consideration for the deed must be shown, and it is not proved by the recitals in the deed, or by the admissions of the grantor at the time of its execution.

WRIT of Error to the Circuit Court of Talladega county.

This is a proceeding against the assignee of a debtor under the act of the 6th February, 1840.

The plaintiff, McCain, sued out process of garnishment against one John L. Smith, as a debtor of Elisha B. Steadman, against whom, together with one Rivers, who were judgment debtors of said McCain, writs of *feri facias* had been issued, and returned *nulla bona*.

Smith appeared on the return of the garnishee process, and

McCain v. Wood.

answered, in substance, that he had contracted a debt of ninety-six dollars with Steadman, one of the judgment defendants which debt he had never discharged, but that previously to being served with the garnishment he had been notified by one Matthew Wood, that Steadman had transferred the debt to him.

The plaintiff, McCain, then moved the Court that notice should be given to Wood to appear at the next term of the Court, and contest the validity of the transfer of the said account.

Notice was given to Wood, and he having appeared, an issue was formed between the parties and submitted to a jury, which returned a verdict in favor of the transfer, upon which judgment was entered.

In the progress of the trial a deed was offered in evidence, purporting to have been executed on the 26th January, 1841, between Steadman of the one part and William Lewis, Matthew Wood and Ephram Pharr of the second part. This deed recited that, on or about the 1st day of October, 1837, a note for one thousand dollars was made by the said parties named as of the second part, payable at the Bank of the State of Alabama, at Tuscaloosa, and discounted by the said Bank; that the money was received and used solely by the said Steadman, the parties to the note having executed it solely for his use, at his request. It also recited that the said Steadman being willing and anxious to secure and save harmless the said Lewis, Wood and Pharr, for that consideration and for the further consideration of five dollars paid by Wood, he, the said Steadman, granted, aliened, assigned, conveyed and set over, and by the same deed did then grant, &c. to the said Matthew Wood, his heirs and assigns forever, all the claims, accounts and debts which the said Steadman then had against all persons in the State of Alabama, for medical services rendered at any time previous to the date of the deed, of every name and nature. The deed also contains a power to collect, and directs that out of the proceeds collected he should pay off, satisfy and discharge the said note, with all proper charges on the same, and the balance, if any, he should pay over to the said Steadman.

The subscribing witness to this deed then proved its execu-

tion on the day of its date, and that the parties to it stated its object to be, in substance, the same as the recitals contained in it. At the same time a book containing accounts for medical services was, by Steadman, delivered to Wood, but the witness made no estimate of the amount of the accounts, nor was he advised who owed them.

The plaintiff opposed the admission of the deed in evidence:

1. On the ground that it had not been recorded as required by law.

2. On the ground that an account could not be the subject matter of such a transfer.

3. Because the deed is void for uncertainty.

4. Because it contains such indications of fraud as to render it void *per se*.

The Court admitted the deed and the plaintiff excepted.

On this state of proof the plaintiff requested the Court to instruct the jury—

1. That the deed was void as to subsisting creditors for want of registration.

2. That it was incumbent on the party claiming under it to prove a consideration for its execution, and that the admissions of Wood and Steadman to the subscribing witness upon the execution of the deed, was not sufficient for this purpose.

3. That it was necessary for Wood to prove that at the time of the service of the garnishment the indebtedness mentioned in the deed still subsisted.

4. That the proof did not warrant a verdict for Wood.

These charges were severally refused and the jury instructed that it was for them to determine from all the evidence and admissions of the said parties, Wood and Steadman, whether there was a subsisting consideration for the deed, or whether it was made in good faith or otherwise—that all the evidence must be taken together—that a consideration must be proved.

The plaintiff excepted to the charges given, as well as to the refusal to give those requested—and here assigns the same for error.

CHILTON, for the plaintiff in error, insisted—

1. That this deed being a trust deed, is within the influence of the act of 1828, [Aikin's Digest, 208, §5,] which requires all

deeds of trust or conveyances of personal property to be recorded within sixty days.

2. That the deed is void for uncertainty, and therefore cannot operate as an equitable or legal assignment. [Jackson v. Roosevelt, 13 John. 97; ib. 357; 5 Wheat. 359.]

3. That the admissions of the parties at the execution of the deed were not competent as evidence of a consideration as against a creditor. Recitals in a deed are no estoppel to strangers. [4 Wash. 691.]

4. That the deed is fraudulent *per se*. [Harvey v. Mims, 4 Cowan, 207, 4 Wash. 139.]

SHORTBRIDGE, contra, argued—

1. That the plaintiff had no right, under the act of 1840, [Meek's Sup. 102,] to proceed in this case. The act extends only to garnishments issuing under original or judicial attachments. In this case the garnishment issues on an execution. The exercise of jurisdiction then in this case cannot affect Wood as the Court was without authority. [3 Caine's, 19; 19 John. 39; 3 McCord, 280; 7 Pet. 37.]

2. This deed is not of *personal property*, within the meaning of the act. [McGreggor v. Hall, 397.] *Choses in action* have no locality, and therefore no creditor could be deceived by the possession remaining with the debtor. [1 Roper on Leg. 190; 2 Mars. 331; 1 Litt. 113.] But another view is conclusive, admitting the statute to cover such property; the deed was executed 26th January, 1841—the notice of garnishment issued on the 28th of the same month; consequently the proceedings were commenced before the time allowed by the statute was elapsed.

3. *Choses in action* may be assigned by delivery merely, and Courts of law as well as Courts of Chancery will enforce and protect the beneficial interest of the assignee, although the legal title may not be passed by the transfer. [13 Mass. 314; ib. 485; 17 John. 284; 19 John. 95; 2 Green. 334; ib. 346; 3 Day, 364; 5 Dana, 522.]

4. As to the supposed uncertainty—elsewhere it has been held that an assignment of all debts presently due is good. [3 Leigh. 389; Rawle 4; 1 Stew. 33.]

5. If the plaintiff suspected fraud, he has shown nothing to

justify his suspicions, and there is nothing in the deed from which it can be inferred.

6. The witness to the deed, nor the evidence given by him, was not opposed; it was no error for him to explain the consideration as expressed in the deed. [5 S. and P. 410; 1 Porter, 328; ib. 359; 5 ib. 498.]

GOLDTHWAITE, J.—1. The argument of the defendant in error insisting that the present proceedings are without authority, renders it necessary to examine the statute under which the plaintiff claims to give jurisdiction.

The first section of the act to amend the law in relation to garnishments, provides, “that when a garnishee, in any case of judicial or original attachment shall answer that previous to the time of such answer, he or she has received notice of the assignment or transfer of the debt, &c., it shall not be lawful for the Court to render judgment against the garnishee on the ground of the invalidity of the assignment, or transfer of the debt, &c.; but the Court shall suspend proceedings against the garnishee until the question is litigated, as provided for in the following section of this act.”

It is urged that as the garnishment issued upon the return of *nulla bona* to an *execution*, it is not within the terms, *any case of judicial or original attachment*. The proceeding by garnishment is, in effect, only ancillary to some previous attachment whenever it relates to a debt. The debt is first attached, or stopped, in the hands of the debtor, and the garnishment is the summons by which he is called into Court to answer. It is true that we have two modes of proceeding by attachment, one of which is called *original*, because the writ of attachment is, in that, the leading process; and the other *judicial*, in which this writ issues after the return of an ordinary *capias*; but in addition to these we have several other ancillary modes of proceeding by attachment. One of these is when an execution has been returned *nulla bona*, the creditor is then permitted, as he has attempted in this case, to reach a debt in the hands of a debtor of the defendant in execution. [Aikin's Digest, 213, §1.] So likewise he may have garnishee process against a debtor without running a *fi. fa.* if he will make affidavit of certain facts. [Ib. §2; Meek's Sup. 9, §7.] He may

also sue out process of attachment as ancillary to a suit at law under certain circumstances. [Meek's Sup. 9, §8.] In all these cases the several statutes prescribe that the proceedings against garnishees shall be in the same manner as required by law against garnishees in original attachments.

It is then wholly unnecessary to inquire whether this proceeding is a judicial attachment, because the proceedings are directed to be the same against a garnishee under the act, by virtue of which this garnishment issued, as they are in the case of original attachments. There is, then, nothing in the objection of the defendant to the jurisdiction of the Court.

2. It is insisted that this deed, to be effectual against a creditor, should have been recorded within thirty days after its execution. It is true the act of 1828, [Aikin's Digest, 208, §5,] avoids all deeds of trust of personal property which are not so recorded, when they conflict with the rights of a creditor or subsequent purchaser, without notice, but our opinion is that this statute was not intended to apply, nor does it apply, to *choses in action*. The obvious intention of this enactment is to provide against the case of a secret trust created on property capable of possession, of which the mischief is apparent, and which must in most cases tend directly to the prejudice of a creditor. The same reasons have little, if any, application to a *chose in action*, which rarely can induce a credit—or which, if such credit is induced, can be reached by attachment, if not actually assigned to another.

3. Whatever may be the intrinsic weight of the objection to this deed for its supposed uncertainty, this is not now an open question with us. In the case of Robinson v. Rapelye, [2d Stewart, 86,] it was held that a conveyance by a debtor of all his property for the benefit of his creditors, required no specific description of the property to be considered as *prima facie* valid. In the present case the deed is not a transfer of all the debts due to the grantor, but only of such as were due him from persons in the State of Alabama, for medical services. No creditor can be affected by this transfer unless notice was had by those indebted. In such a case it cannot be doubted that a Court of Equity would protect the assignee against any collusive payment made to the debtor subsequently to notice of the assignment, and if the transfer is effectual for such a

purpose, we can see no reason why it is not as against a creditor. In either case the true question is as to the actual transfer of a beneficial interest in the *chose in action*. Whenever this is shown, the interest of the assignee will be protected, and the cases are numerous to show this is the rule in Courts of law as it certainly is in Courts of equity.

4. There is nothing on the face of the deed to warrant a Court in declaring it fraudulent and void. If the transfer was of debts to an amount greatly exceeding the liability intended to be secured, and these were due from solvent persons, we are not prepared to say that this circumstance might not be left to a jury, as a fact from which fraud could properly be inferred; but in the condition in which the case stood before the Court, any presumption of fraud was unwarranted.

5. Upon the question of consideration, we think the proper charge was requested by the plaintiff. It is apparent the deed was executed after the indebtedness had accrued to McCain, and even after his debt was reduced to judgment. Under these circumstances the admissions of Steadman ought not to have any effect on his rights. The objection to such evidence is, that it could at any time be manufactured by one indebted, and by means of it a creditor might be defeated, as it would in most cases be impracticable to prove a negative, or to disprove the consideration said by his debtor to have passed from another. We do not deem it important to examine whether the charge as given is obnoxious to criticism, because we have repeatedly held it to be the duty of a Court to give a charge, if properly asked for, however it may afterwards explain or modify it.

For this error the judgment of the Circuit Court is reversed and the cause remanded.

HRABOWSKI'S EX'RX V. HERBERT, DANIEL & Co.

1. Where a motion is made to exclude *all the testimony* given by a witness, a part of which is admissible, the Court is not bound to distinguish the legal from the illegal evidence, but may overrule the motion *in toto*.

WRIT of Error to the County Court of Lowndes.

This was an action of trover brought by the defendants in error against the plaintiff's testator, to recover damages for the conversion of a gold watch, chain and seal. Pending the cause the testator died, and it was regularly revived against his executrix.

On the trial the defendant excepted to the ruling of the presiding Judge. From the bill of exceptions it appears that the plaintiff introduced one Hartwell as a witness, who testified that the firm of Herbert, Daniel & Co. consisted of E. H. Herbert, Isaac N. Daniel and N. Cook, and did business as merchants in Hayneville. Among other goods for sale by them was a gold watch—this watch he saw in the possession of Dr. Sturgus, but was not present when he obtained it; recollects however that he came to the store and remarked to Mr. Daniel, "Your watch dont keep time." Thereupon Daniel and Sturgus taking the watch with them, went to the watch-maker's. The defendants kept books in which were made entries of sales. When an article was sold for cash it was entered on the cash book, when on a credit in the regular book of entries.

Witness was a Clerk of the defendants, and stated that no entry of the sale of the watch was to be found in any of their books. The watch was worth one hundred and seventy-five dollars, and was seen in Sturgus' possession in 1836 or 7; in the latter year Sturgus died. To the admission of this evidence the defendant objected, but his objection was overruled and it was permitted to go to the jury, who returned a verdict for the plaintiffs, on which the judgment was rendered.

T. WILLIAMS, for the plaintiff in error, insisted that the Circuit Court erred in permitting the witness Hartwell, to relate

Hrabowski's Ex'rx. v. Herbert, Daniel & Co.

the conversation between Dr. Sturgus and Daniel, one of the plaintiffs below. It was also illegal to permit the witness to prove that the books of the firm contained no entry of a sale of the watch to Dr. Sturgus; the books themselves not being produced or their absence accounted for.

COOK, for the defendant. The bill of exceptions is defective and presents no point. [Stone v. Stone, 1 Ala. Rep. 582.] A part of the testimony of the witness was certainly admissible, consequently the motion to reject all was properly denied. [Litchfield v. Falconer, 2 Ala. Rep. 280.] The rule which requires the production of written evidence when extant, does not make it necessary to produce books in which no such entry as the witness spoke of was made.

COLLIER, C. J.—It was certainly competent for the plaintiffs to show, that the watch, with the conversion of which the testator was charged, was once the property of the plaintiffs, and in their possession as such. Thus far the testimony of the witness, Hartwell, is not here objected to. Whether it was admissible as to the other facts related by him, it is unnecessary to inquire. The bill of exceptions sets out all that the witness testified on the part of the plaintiffs, and the defendant objected to it *en masse*. Now it has been repeatedly adjudged by us, that where evidence embraces several distinct facts, as to some of which it is admissible and as to others not, the party objecting to it must particularize so as to distinguish by his objection, the part which is competent from that which is illegal. If he does not, the Court is not obliged to do it for him, but may overrule the objection *in toto*. This principle applies with all force to the present case; and without considering whether the entire testimony was admissible, we are satisfied that the refusal of the Court to exclude it, is not available on error.

The judgment is consequently affirmed.

HAYES, EX'RX. V. JOHNSON ET AL.

1. A bill of interpleader lies only where two or more persons claim the same debt or duty from the complainant, by different or separate interests.
2. The bill alledged that the testator of complainant executed two notes to J. C. with J. as surety—that the testator was afterwards garnisheed by O. & B. to answer whether he was not indebted to P. C.; that after his death, a jury, upon an issue made upon complainant's answer, found that the testator was so indebted, and judgment was rendered against her in favor of O. & B. on the garnishment; that J. C. instituted a suit against J. as the surety of the testator, and recovered a judgment against him, which he discharged, and moved against the complainant for a judgment for the amount so paid as surety of the testator—Held that this was not the case of two persons claiming the same debt, and that a bill of interpleader would not lie.

ERROR to the Chancery Court at Columbiana.

This was a bill in Chancery filed by the plaintiff in error against the defendants in error.

The bill charges that the testator of complainant, in his lifetime, was indebted to the defendant, John Cavanaugh, in the sum of seven hundred and sixty dollars for the payment of which he gave two notes, due on the 1st March, 1833, with the defendant, Johnson, as his surety—that on the 9th May, 1832, the testator was summoned as a garnishee, at the instance of the defendant, O'Connel, and one James Brennan, who were partners, and who were prosecuting an attachment against one Patrick Cavanaugh, to answer and say what he was indebted to Patrick Cavanaugh—that her testator died in January, 1833, without answering the garnishment—that on the 24th January, 1834, complainant consented to be made a party to the proceeding as executrix and waived the service of a *sci. fa.* which had been awarded against her, and answered that her testator bought goods of a man by the name of Cavanaugh, and gave him his note therefor, but that she did not recollect the amount—that at the February term of the Court an issue was directed and tried to ascertain the amount due from the testator to Patrick Cavanaugh, and that the jury found the

Hayes, Ex'rx. v. Johnson et al.

amount to be nine hundred and seventy-two dollars and fifty cents, for which judgment was rendered against her as executrix, in favor of the plaintiff in attachment, which judgment was afterwards affirmed in the Supreme Court. The proceeding in the County Court on the attachment is made an exhibit to the bill. It is also charged that O'Connell, survivor of Brennan, is urging the collection of the judgment by execution.

The bill further charges, that at the spring term of the Circuit Court of Autauga, defendant, John Cavanaugh brought suit on the notes executed by the testator and Johnson as his surety, against Johnson—that as soon as she was advised of this fact, she lost no time in advising Johnson of the garnishment, and that he must make that a defence, to the suit against him—that he in substance replied that he did not believe the garnishment of any force, and exhibits a letter from him to her to that effect. That Johnson suffered judgment to go without defence, and now, alledging that he has paid the judgment, is proceeding by motion to recover the amount so alledged to be paid by him as the surety of her testator—that she believes that Johnson suffered the judgment to be obtained by John Cavanaugh by colluding with him, and that he has not in fact paid the judgment—that her answer to the garnishment was predicated on the indebtedness of the testator to John Cavanaugh, and that on the trial of the issue, the jury believed the notes were the property of P. Cavanaugh, and so rendered their verdict in favor of O'Connell & Brennan, plaintiffs in the attachment suit against Patrick Cavanaugh—that she is in danger of paying the same debt twice, and is ready and willing to pay to the person entitled to receive it, and offers to bring the money into Court, and prays that the defendants be enjoined, &c. and compelled to interplead.

The injunction was granted according to the prayer of the bill.

Publication was made and the bill taken as confessed as to Patrick Cavanaugh.

John Cavanaugh answered and admitted that he had obtained judgment against Johnson, and that the judgment was satisfied. That Patrick Cavanaugh had no claim or interest whatever to the debt secured by the notes of testator, and that admitting the proceedings on the garnishment to be as stated in the bill,

that he cannot be prejudiced by a judgment to which he was neither a party or privy, and denies all fraud or collusion with Johnson.

Johnson, by his answer, admits that he was sued by John Cavanaugh, on the notes executed by him with the testator, and as his surety, and that judgment was obtained thereon, which he has satisfied—that the notice given to him by the complainant of the pendency of the garnishment, was not received by him until after the judgment was rendered against him. He denies all fraud or collusion with John Cavanaugh, and insists that he acted fairly and *bona fide*.

O'Connell admits the proceeding under the garnishment, which, he says, was instituted at the instance of the testator, who informed him that the goods for which the notes were given were purchased from one Patrick Cavanaugh, and that the notes were given to John Cavanaugh, his brother, for the purpose of defrauding the creditors of Patrick Cavanaugh. He insists that the judgment on the garnishment was fairly obtained and demurs to the bill.

The Chancellor, on motion of the defendant, dismissed the bill, but without prejudice to the right of the complainant to file a new bill against O'Connell, as she might be advised.

From this decree the complainant prosecutes this writ of error.

EDWARDS, for the plaintiff in error, and J. B. CLARKE, for the defendants in error, submitted the cause without argument.

ORMOND, J.—We agree entirely in the view taken by the late Chancellor Peck, of this case.

It is very clear that the bill cannot be maintained as a bill of interpleader. That only lies where two or more persons claim the same debt or duty from the complainant by different or separate interests. [Cooper's Equity, 45; Story's Eq. Pleading, 237.] The bill alleges that the testator of complainant executed two notes for upwards of seven hundred dollars to one John Cavanaugh, with the defendant, Johnson, as his surety—that a garnishment issued at the instance of the defendant, O'Connell, against her testator, to answer whether he was not

Hayes, Ex'rx v. Johnson et al.

indebted to *Patrick Cavanaugh*—that after the testator's death, the jury, upon an issue, found that he was so indebted, and judgment was rendered against her in favor of O'Connell for the debt.

It also appears that John Cavanaugh commenced suit against Johnson on the notes executed by the deceased, and obtained judgment, which Johnson paid, and, under the statute, moved against the complainant for a judgment for the amount so paid by him, as the surety of her testator. Now it is most certain that this is not the case of two persons claiming the *same debt*; the claim of Johnson is founded on the the payment by him of a debt for which he was bound as the surety of the testator of complainant whilst the claim of O'Connell is founded on a judgment against the complainant by a garnishment against her testator as the debtor of a person with whom the debt paid by the surety, does not appear to have any connection whatever. Whatever, therefore, may be the relief to which the complainant is entitled, it cannot be obtained in this action.

The facts presented on the record are not a little extraordinary, and could only have been produced by the most culpable negligence on the part of the complainant, or by the fraudulent contrivance of others.

It would be premature at this time to enter into an examination of the facts of the case, as the bill must be dismissed without prejudice, but it is proper to remark that no doubt can exist of the right of Johnson to recover the amount of the judgment paid by him as the surety of complainant's testator. The allegation that he suffered the judgment to be obtained collusively is positively denied, and is disproved by the facts of the case, as the judgment against him was obtained previous to the judgment on the garnishment.

It is difficult, however, to resist the conclusion, that there may not have been some unfair practice on the part of O'Connell or his agents, in obtaining the judgment on the garnishment, and we therefore concur with the Chancellor in dismissing the bill without prejudice to any suit the complainant may think proper to institute.

OLIVER, ADM'R. V. HEARNE & WHITMAN.

1. A judgment *de bonis testatoris* is erroneous when the declaration sets out a cause of action created by the administrator in his own name and right, although he is described as an administrator in the declaration.
2. Where a judgment is rendered *de bonis testatoris* when it should have been *de bonis propriis*, it will be reversed and rendered at the cost of the plaintiff in error.

WRIT of error to the Circuit Court of Lowndes county.

Cook, for the plaintiff in error, cited *Greening v. Sheffield*, Minor, 276; *McEldery v. McKenzie*, 2 Porter, 33.

BOLLING, contra.

GOLDTHWAITE, J.—The declaration describes the defendant as administrator of the estate of John McGill, deceased, and alleges the making of a promissory note by the administrator, whereby he promised, as such administrator, to pay, &c.

The judgment is rendered to be levied of the goods and chattels of McGill in the hands of the administrator.

In our opinion this judgment is erroneous, because the suit is, in fact, against the administrator as an individual and not in his representative capacity. The words, administrator, &c. must be considered as *descriptio personæ*.

The judgment must be reversed and here rendered *de bonis propriis* at the cost of the plaintiff in error, as, in our opinion, the error is one of a clerical nature, which could have been amended in the Court below, under the statute of 1824. [Digest, 266, §48; *Weatherford v. Weatherford*, 8 Porter, 171.]

THE STATE v. ABRAM.

1. A Court organized under the act of 1832, "to provide for the speedy trial of slaves and free persons of color," ceases to possess the power to proceed further in the case submitted to it after it has tried the accused and pronounced the judgment of acquittal or condemnation; consequently if its judgment is erroneous, and reversed by a higher Court, the case should not be *remanded*, but if further proceedings are proper, it should be tried *de novo*.
2. When one of the Justices of the Peace composing a Court, organized under the act of 1832, for the trial of slaves, withdraws from the bench after the trial is entered upon, and his place is supplied by another, and for that cause a judgment of condemnation is reversed, the prisoner cannot be said to have been in jeopardy, and he may be tried again; and this although the judgment of reversal does not award a *venire facias de novo*.
3. The act of 1832, in providing a tribunal for the trial of slaves, &c. does not exclude the jurisdiction of the Circuit Court in such cases, which is conferred by the constitution itself.

The prisoner, a slave of Daniel Long, was indicted at the Circuit Court of Dallas, holden in 1842, for the murder of Reuben, a slave of the same master. To the indictment he pleaded in abatement, that on the 23d of August 1841, he was tried for the offence charged in the indictment by a special Court, composed of the Judge of the County Court and two Justices of the Peace of Dallas, and found guilty, upon which conviction he obtained a *certiorari*, and caused the proceedings to be removed to the Circuit Court, where the verdict and judgment of the special Court was reversed; and further, there has been no other trial of him by the special court; wherefore he prays that the indictment may be quashed. This plea was adjudged bad on demurrer; and thereupon the prisoner pleaded—1. Not guilty. 2. Autrefois acquit.

On the trial certain questions of law were reserved by the presiding Judge, and the prisoner being found guilty and sentenced to death, the same are referred to this Court as novel and difficult. It appears from the reference that the prisoner was tried and convicted as alledged in his second plea; that that conviction was, on the 5th November, 1841, reversed by the Circuit Court of Dallas, on the ground that the special

Court permitted one of the Justices of the Peace after the trial had commenced, to withdraw from the Bench, and another to take his place. The judgment also directed the prisoner to be remanded to custody, until discharged by due course of law. It was shown that the offence charged was committed previous to the time when the act of the 9th January, 1841, "regulating punishments under the penitentiary system," became operative, and the case had never been sent back for trial to the special Court. Upon this evidence the prisoner's counsel moved the Court to charge the jury—

1. That as the prisoner had not been returned to the position he occupied when the error was committed by the special Court, and could not be so returned, he was in law discharged and should be acquitted.

2. That as the cause had not been remanded, nor the prisoner discharged by the Circuit Court, the right to try him pertained to the special Court by which he was first tried—that Court not being abolished as to his case.

R. SAFFOLD, with whom was G. W. GAYLE, for the prisoner, contended that the Circuit Court erred in sustaining the demurrer to the plea in abatement. The prisoner, if subject to trial, should have been tried before the special Court which first tried him; that Court continued, and the statement there made against him, (which was but the substitute for a formal indictment,) never having been adjudged insufficient, should have been thence remanded, if further proceedings were contemplated. [The State v. Hughes, 2 Ala. Rep. 105; Arch. Crim. Plead. 87.]

The offence was committed and proceeded against by the special Court before the act "regulating punishments under the penitentiary system," took effect, and before the law authorizing such a Court was repealed; and its jurisdiction could not be interfered with. [2 Stew. & Por. Rep. 9, 15.] But even the special Court could not have proceeded against the prisoner, because the cause was not remanded and a *venire facias de novo* awarded. [Aik. Dig. 256; 5 Cow. Rep. 608; 1 Caine's Rep. 586; 2 S. & P. Rep. 9, 15.]

The Circuit Court should have given the first charge prayed. [State v. Ned, 7 Porter's Rep. 187.] The prisoner was tried by a Court on an indictment different from that on which

he was first tried; besides, the law as modified required that two thirds, instead of one half, the jury should be slaveholders.

The manner of the proceedings in this case, up to the time of the finding of the indictment in the Circuit Court, was such as to entitle the prisoner to his discharge, and his trial was consequently unauthorized. [2 Sumner's Rep. 38; 6 Sergt. & R. Rep. 577; 1 Hayw. Rep. 241; 1 Dev. Rep. 491; 9 Wheat. Rep. 579; 8 Wend. Rep. 549; see *Ned v. The State*, 7 Porter's Rep. 187.]

THE ATTORNEY GENERAL, for the State—

1. The question is not whether the judgment of the special Court was properly reversed by the Circuit Court. If necessary, the legal conclusion will be in favor of its reversal.

2. The act creating the special Court did not originate a tribunal of exclusive jurisdiction, but one which, to the extent of its powers, acted concurrently with the Circuit Court. [*Ned v. The State*, 7 Porter's Rep. 187.]

3. The judgment of reversal did not entitle the prisoner to his discharge; and the case could not have been remanded, for the special Court ceased to exist so soon as it adjourned after the trial.

4. The judgment of reversal assumes that by the withdrawal of one of the Justices of the special Court, that Court was *ipso facto* dissolved, and it is insisted the substitution of another Justice, and the subsequent proceedings were unauthorized and did not put in jeopardy the life of the prisoner. Had the Court ceased its operation after the Justice withdrew, the case would have assimilated itself to that of *Nugent v. The State*, 4 Stew. & P. Rep. 78; see also *The State v. Hughes*, 2 Ala. Rep. 106, N. S.

COLLIER, C. J.—It may be well to premise that independently of any legislation upon the subject, this Court, in virtue of its constitutional powers, was competent to award a writ of error to bring up for revision the proceedings in a criminal cause in which the accused had been convicted. [*Lynes v. The State*, 5 Porter's Rep. 236.] In cases of *treason and felony* it was grantable at discretion, and in misdemeanors *ex de-*

The State v. Abram.

bito justitiæ. The law in this respect, has been so far modified by the second section of the thirteenth chapter of the act of 1841, "regulating punishments under the penitentiary system," as to authorize any one of the Judges of this Court, when it is not in session to award the writ; and in all cases without reference to the grade of the offence, it is to be granted at the discretion of the Judge or Court. By the first section of the chapter, the Judge presiding on the trial of a criminal case is authorized to refer novel and difficult questions of law to this Court for its decision, in the same manner as was provided by the previous enactment.

Anterior to the act of 1841, it was the settled practice of this Court, never to reverse a judgment where a case was referred to us, unless the error was shown by the points reserved. That statute it is conceived does not effect such a change in the law as to warrant a departure from a practice coeval with the State government. If the record discovers errors, which the order of reference does not bring to our view, the correct course of procedure is, to ask for a writ of error, that they may be adjudicated.

In the present case the prisoner's counsel has admitted that at least one of the points discussed by him is not presented by the order of reference, and though we cannot give him the benefit of it in the judgment we are to render, yet we will consider it, that it may be seen whether it should be reviewed on error.

Addressing ourselves to the case we will inquire—1. Whether the charge against the prisoner should, upon the reversal of the judgment by the Circuit Court, have been remanded to the special Court (as it is designated,) before which he was tried?

2. Did not the reversal of the judgment by the Circuit Court entitle the prisoner to a discharge, not only from the charge preferred before the special Court, but from all further prosecution?

3. Had the Circuit Court primary jurisdiction of the case of a slave charged with a capital offence previous to the act of 1841, and could it take jurisdiction under the circumstances?

By the act of 1832, "to provide for the speedy trial of slaves and free persons of color," [Aik. Dig. 124,] it is enacted that the Judge of the County Court of every county in this State,

together with two Justices of the Peace to be associated with him, or in case there should be no Judge of the County Court, then any three Justices of the Peace shall constitute a Court for the trial of all slaves and free persons of color charged with any crime or misdemeanor of a higher grade than petit larceny. *Further*, whenever a slave or free person of color shall be brought before a Justice of the Peace, charged with the commission of such an offence, if after examining the witnesses for the prosecution, the Justice shall believe that there exists any probable ground of the guilt of the accused, he shall immediately commit him or her to jail, and shall at the same time issue a notice to the Judge of the County Court of his county, and also some Justice of the Peace, which notice shall be served, &c. informing them of such commitment, and state the time and place of trial, &c.; and the Justice who shall make the commitment and the Judge of the County Court, or if there be no Judge of the County Court, two Justices of the Peace thus summoned, shall form a Court to try and determine the offence. The act also provides other matters preparatory to the trial, as well as the proceedings thereon, and invests the Court with power to pronounce the sentence of the law consequent upon a conviction. The Court authorized by this statute to be formed as it is limited in its powers is also temporary or ephemeral in its existence; its being ceases with the occasion which gave to it life. When it has tried the accused and pronounced the judgment of acquittal or condemnation the purpose for which it was convened is consummated, and its authority necessarily at an end. The law does not contemplate it as a permanent Court, but as an association of magistrates acting under a special commission, deputed *pro hac vice* to perform extraordinary judicial powers; and when the duty confided to them has been discharged, even erroneously, they take their ordinary official stations, and can't act unitedly again in the trial of the accused, without a new commission.

In this view of the special Court it follows that the Circuit Court could not have remanded the case of the prisoner, and that the order made upon the reversal of the judgment was entirely regular, unless he was entitled to a discharge.

2. In considering the second point we will assume, that the judgment of the special Court was erroneous, and was there-

fore rightfully reversed. The inquiry then is, could the prisoner be again put upon his trial?

It is insisted that his life was put in jeopardy by the trial in the special Court, and that the constitutional provision declaring that "No person shall, for the same offence, be twice put in jeopardy of life or limb," which is affirmative of the common law, operated as a bar to all further proceedings against him. This argument is attempted to be sustained by the case of *Ned v. The State*, [7 Porter's Rep. 187, and the cases there cited.] In that case the Court say, "If by a reversal of the judgment the prisoner could be placed in the same position which he occupied when the error was committed, we might say in accordance with the adjudicated cases, that his life had never been at hazard; but in the present case, we never can return the prisoner to that stage of the case at which the error intervened." There the jury to whom was committed the case of the prisoner were discharged by the Court merely upon their representation that there was no reasonable probability that they could agree upon a verdict. Now it was obvious that a jury entertaining in all respects the same opinion of the evidence and controlled by similar influences, could not again be selected; hence it was holden, that as the accused might be irreparably prejudiced by their causeless discharge, he could not be further proceeded against. But the same reason will not apply to a Judge who withdraws from the Bench pending a criminal trial. The law is stable and certain, though differently understood and expounded by different judicial officers; and it is always the same, no matter by whom administered. It is then entirely competent to place the prisoner precisely in the same situation in which he was when a Justice of the special Court withdrew. He certainly could not be placed in a situation less favorable to an acquittal, as is clearly indicated by the verdict then rendered. The case cited, instead of being an authority for a reversal of the judgment of the Circuit Court, seems to us imperiously to require its affirmance. The very elaborate examination there given to the constitutional provision, and the extended review of the cases touching the principle of the common law, which it affirms, renders it unnecessary for us now to go over the same ground. It may be added, however, that if the case cited was out of the way, the cases of *The*

The State v. Abram.

State v. Williams, [3 Stew. Rep. 454,] The State v. Hughes, [2 Ala. Rep. 106,] and The State v. Lore, at this term, [*ante*. 173,] would show that the prisoner was not entitled to a discharge.

3. In respect to the third question, it may be remarked that if a judgment pronounced upon a conviction be falsified or reversed, all former proceedings are absolutely set aside, but the party convicted remains liable to be prosecuted another time for the same offence. [Stephens' Crim. Law, 332; 1 Chit. Crim. Law, 750; People v. Casbours, 13 John. Rep. 351; 3 Phil. Ev. C. & H. ed. 226, and cases there cited; *ib.* 952-4.] This being the law, the failure of the Circuit Court to award a *venire facias de novo* upon rendering the judgment of reversal can have no influence upon the subsequent proceedings.

The sixth section of the fifth article of the constitution provides, "The Circuit Court shall have original jurisdiction in all matters, civil and criminal, within this State, not otherwise excepted in this constitution; but in civil cases only when the matter or sum in controversy exceeds fifty dollars." The language here employed is too explicit to allow it to be seriously questioned whether the Circuit Court is competent to entertain jurisdiction of a capital offence committed by a slave. But if it were even doubtful, the question could not now be regarded as *res integra*. In the first case that was brought here after the passage of the law providing for the special Court, although no opinion was filed, this Court stated that the statute was cumulative and slaves were subject to be prosecuted in the Circuit Court as previously. The correctness of that decision has never been drawn in question, but has been repeatedly acted on, and will not now be disturbed.

We have considered this case with the sincerest desire to confine ourselves within the limits of the strictest rules, perhaps with too strong a desire to infuse into the administration of justice an undue measure of mercy; and our firm conviction is, that consistently with the law we cannot prolong the prisoner's existence. We have only to announce that the judgment of the Circuit Court is affirmed.

MEAD ET ALS V. FIGH & BLUE.

1. The sheriff having an execution against G. entered thereon a fictitious levy of a slave, as the property of G. when, in fact, there was no such slave in existence, and took from G. a forthcoming bond, with F. & B. as his sureties for the delivery of the slave at a stipulated time. The bond being returned forfeited, and execution having issued thereon against the principal and the sureties—Held, that the sureties could not be relieved in Chancery because the *levy* was fictitious.

ERROR to the Chancery Court at Montgomery.

The bill charges that the defendant, Reid, as sheriff of Montgomery county, received an execution from the Circuit Court of Montgomery, in favor of the defendant, Mead, against the defendant, Gillan—That Gillan was possessed of a valuable stock of goods, in the town of Montgomery, and to prevent a levy on the goods and save the trouble of taking an inventory, and prevent the necessity of closing the doors of the store of Gillan, it was agreed between the sheriff and Gillan to execute a delivery bond for a slave by the name of Thomas, which was a fiction, as Gillan owned no such slave, and that it was agreed that goods should be received by the sheriff in discharge of the delivery bond, which was accordingly executed with the complainants as sureties—that Gillan was ready to deliver the goods, but the sheriff did not call to receive them or go on to sell them, but returned the bond forfeited—that Gillan has become insolvent, and the goods, which were all his property, have been sold. The prayer of the bill is for a perpetual injunction.

Reid, by his answer, denies any agreement to receive the goods in discharge of the bond—that the levy endorsed on the execution was by the direction of Gillan—that he did not then nor when the answer was made, believe there was any such negro. Admits that he returned the bond forfeited, and that an execution has issued thereon. Admits the insolvency of Gillan, and that the goods were sold to satisfy other executions.

The testimony shows that no levy was in fact made—and that the indorsement on the execution as having been levied was fictitious. There was no proof of any agreement or understanding that the goods were to be delivered in discharge of the bond. It was proved that Figh knew the levy was fictitious.

At the hearing the Chancellor declared the forthcoming bond null and void, and perpetuated the injunction which had issued upon it—from which decree this writ is prosecuted.

GOLDTHWAITE, for the plaintiff in error, argued that the bond could not be impeached except on the ground of fraud—that the fact that the slave indorsed upon the execution as having been levied on had no existence, was not proof of fraud. [4 H. & M. 180; 6 Munf. 358.]

But if otherwise, the complainant, Figh, could not avail himself of it, as he knew the fact when he executed the bond. [3 Marsh. 338; 11 Vermont, 483.]

The recitals of the bond cannot be contradicted but on proof of fraud. [14 Peters, 201.]

WILLIAMS, for defendants in error, contended, that as there was no levy in fact, the sheriff had no authority to take a bond—that this was not like the case where slaves have been levied on claimed by other persons—they were in *esse*, and therefore a delivery possible—that it was a fraud in the sheriff to return a false levy.

The doctrine of estoppel does not apply in equity.

In equity a specific performance is never decreed where it is impossible. In equity the obligor in a bond has a right to be discharged from the penalty of the bond, by performing the condition—when, as in this case, that is impossible, he is excused from the performance.

ORMOND, J.—The complainants were sureties to a delivery bond, which being returned forfeited, and execution having issued thereon, they seek to avoid the bond on the ground that the levy was fictitious, there being no such slave in existence as the one described in the bond as having been levied on by the sheriff to satisfy Mead's execution.

The Chancellor considered the return of the sheriff that he had levied on a slave which had no existence, as false and fraudulent, and that the forthcoming bond based on such a false levy was at least voidable.

We are not able to perceive the difference between a levy on the property of a stranger to the execution, or on property in which the defendant in execution has no interest, and a fictitious levy. In *Syme v. Montague*, [4 H. & W. 180,] it was held that the sureties to a forthcoming bond could not be relieved in equity on the ground that the defendant in execution was not the owner of the property levied on. The same principle was affirmed at the last term of this Court in the case of *Jemison v. Cozzens*, [3 Ala. Rep. 636,] where we held, that equity could not relieve a surety to a forthcoming bond which had been returned forfeited, on the ground that the slaves there levied on, were the separate property of the wife of the defendant in execution.

If it could be shown that the defendant in execution had no title to the property levied on, and therefore his sureties should be relieved against the penalty of the bond, no reason is perceived why they should not be relieved *pro tanto*, if the property was not of value sufficient to satisfy the execution, and yet it is most obvious such an inquiry would not be permitted.

If it be conceded that a fictitious levy, like the present, is false and fraudulent, we are unable to see how the plaintiff in execution, who is no party to it, can be affected by it.

The law gives the defendant the right to suspend the collection of the money upon his doing certain acts, and it could not be tolerated that he should be permitted afterwards to say that these acts are not binding on him, because they assert a falsehood. His sureties can be in no better condition than he is, they are not only guarantors for the performance of the act he undertakes to perform, but must also be considered as sponsors for the truth of his declarations that such act may be performed.

We are therefore of opinion, that according to well established principles, as well as on grounds of public policy, the complainants are not entitled to the relief sought by the bill.

Brown v. Foster.

The decree of the Chancellor, therefore, perpetuating the injunction prayed for in the bill is reversed, and this Court, proceeding to render such decree as the Chancellor should have rendered, hereby orders and decrees, that the bill be dismissed.

BROWN v. FOSTER.

1. The negotiable quality of a promissory note is destroyed by the recovery of a judgment against its maker. And no right of action against an indorser can be then transferred to another so as to enable him to maintain an action in his own name.
2. The holder's right of action against an indorser will exist only as an ordinary *chose in action* after the recovery of a judgment against the maker of a note—and it is questionable whether an equitable interest in it can be transferred without an assignment of the judgment.
3. The admission of record by the plaintiff that the suit is brought for the use of another, has no effect against the defendant in the action except to exclude admissions made by the nominal plaintiff pending the suit.

WRIT of Error to the Circuit Court of Tuscaloosa county.

Assumpsit by Brown, who states in his declaration that he sues for the use of Clements against Foster. The plaintiff sues as indorsee of a promissory note, not payable in bank, made by one Atkins, payable to one Beard, by him indorsed to the defendant, and by him to the plaintiff. The declaration contains the averment of suit against the maker, and the return of the execution against him of *nulla bona*. The defendant pleaded non assumpsit, payment and set-off, to which there are replications and issues.

The pleadings are in short by consent of parties.

At the trial the defendant gave in evidence a note made by the nominal plaintiff and himself, and proved that he was se-

Brown v. Foster.

curity for Brown, and had paid the same before the commencement of this suit, and before Clements had any interest in the note sued for. Also, a note made by the nominal plaintiff, payable to the defendant, due at a day previous to the commencement of this suit.

The plaintiff objected to the admission of this evidence as a set-off, and excepted to the opinion of the Court overruling his objection. The admission of the set-off is now assigned for error.

CLYDE and MOORE, for the plaintiff in error, insisted, that Clements was the actual plaintiff in this action, and therefore no set-off against Brown could properly be allowed under the act of 1812, [Digest 231.] For all purposes the person who has the beneficial interest in a promissory note must be considered as the plaintiff, and if the set-off would not avail the defendant, if the suit was in Clements' name, it ought not because, from peculiar circumstances, he has been compelled to use that of Brown. The case of *Stocking v. Toulmin*, [3 S. and P. 43,] is decisive that the maker of a note will not be permitted to set off a demand against an intermediate indorser. The equity of the maker is the one protected by the statute, and the instant that an indorsement is made it creates a conditional liability to every *bona fide* holder of the indorsed paper. If the rule was otherwise, it might happen in this case, that Clements' right to the judgment against the maker would be transferred. Brown, by the operation of this set-off, it being equivalent to a payment, would, by a Court of Equity, be compelled to transfer the judgment to Foster. To show that Courts at this day treat the beneficial owner as the actual plaintiff and allow sets-off against him, they cited *Corser v. Craig*, 1 Wash. C. C. 427; *Wheeler v. Wheeler*, 9 Cowen, 34; *Frear v. Evertson*, 20 John. 142; 2 Phil. Ev. C. & H. notes, 163; 1 B. & P. 447; *Green v. Darling*, 5 Mason.

That no equities arise except those growing out of the note itself. See *Robinson v. Breedlove*, 7 Porter, 541; *Robertson v. Crenshaw*, 2 S. and P. 276; *Murray v. Lyle*, 2 J. C. R.

PECK & CLARK, contra, contended that there was nothing to bring this case within the influence of *Stocking v. Toulmin*, or

the subsequent case of *Kennedy v. Manship*, [1 Ala. Rep. N. S. 43.] There is nothing in this case to show that Clements is either the indorsee or holder of the note. The assertion that the suit is for his use, is a mere designation that the money, if recovered is to go to him—but this proves nothing.

But if he was shown to be the holder the set-off would be proper under the general statute of set-off. [Digest 281, §22.] The suit is in Brown's name, and for this reason the set-off was properly allowed. [*Gee v. Nicholson*, 2 Stewart, 512; *Wheeler v. Raymond*, 5 Cowen, 231; 3 N. H. R. 539; *French v. Garner*, 7 Porter, 544.]

But independent of this, Foster is within the equity of the act authorising the maker of a promissory note to have the benefit of any set-off, &c. against the payee, because he stands in that relation to Brown, being his immediate indorser.

GOLDTHWAITE, J.—1. We think it must be intended from the allegations of the declaration that Brown commenced the suit against Atkins and prosecuted it to judgment in his own name, without any designation of a use to another.

The effect of this suit was to destroy the negotiable quality of the note, which thereby became merged in the judgment and was therefore incapable of further transfer.

Having thus lost its negotiable quality, no right of action from any indorsement on it could be transferred to Clements so as to enable him to maintain an action in his own name. The reason why this cannot be done is, that the maker and the several indorsers are liable for the same debt, though in different modes, and a payment by the maker is a discharge of each of the indorsers. But if one indorsee could obtain judgment against the maker, and afterwards transfer a right of action to another, in one or more of the indorsements, different plaintiffs would have different judgments for one and the same debt, and it would be difficult if not impossible to ascertain which was entitled to satisfaction, or who was discharged by the payment if satisfaction was made. This reason is conclusive to show that the maker and indorsers of a note cannot be liable to different persons at the same time. [*Beek v. Robley*, 1 H. B. 89; *Marsh v. Newall*, 1 Taunt. 109; *Randall v. Bell*, *Bailey J.* 1 M. & S. 723; *Hall v. Gentry*, 1 Marshall, 555.]

2. In the present case, Brown's right of action against Foster continued to exist after the judgment recovered against the maker of the note, but it continued merely as an ordinary chose in action—and it may well be questioned whether any equitable right whatever could be transferred without an assignment of the judgment, for it is impossible to conceive of a separate ownership of these liabilities, without an entire subversion of the indorser's right of subrogation consequent upon his payment of the note.

Conceding much force to the argument that the equities existing between Brown and Foster, ought not to affect Clements if the note had not lost its negotiable quality at the time when transferred to him—we will now inquire whether the record discloses when, or the manner by which, Clements obtained an interest in the note.

3. It is not alledged in the record, nor was it in evidence, so far as we can learn from the bill of exceptions, that Brown assigned or transferred the note to Clements at any time previous to the recovery of judgment against the maker, consequently he is not now to be considered as having obtained an interest in it until its negotiable quality was lost by its merger into the judgment.

The only indication of his having an interest in the suit, is the admission made by Brown upon the record, that the action is instituted for his use. This mode of proceeding is quite common with us, and is a convenient mode of informing the defendant that the beneficial interest in the suit is transferred to the person therein named. Besides this, the practice is directly recognized by statute, the plaintiff is made responsible for costs, and the suit will not abate by the death of the nominal plaintiff. [Dig. 262, §22, 259, §3.] Some other unimportant consequences may flow from this mode of proceeding, but we are not aware of any decisions, either here or elsewhere, which gives it any effect against the defendant except to exclude evidence of the admissions *pending the suit*, of the nominal plaintiff. [Chisholm v. Newton, 1 Ala. Rep. 371.] On principle this admission of interest in another seems to stand on the same footing as any other, with the exception that it affords evidence that the defendant is advised of the transfer of the interest in the suit. The counsel for the plaintiff in error has

McRae v. Juzan et al.

conceded the set-off would be proper if this suit was in reality as it is in name, the suit of Brown. We think the *onus* remained with him to show that Clements was the real party in interest, and also that the note was transferred to him before its negotiable quality was destroyed in consequence of the judgment recovered against its maker. As this was not done the question so ably argued is not supposed to arise.

Let the judgment be affirmed.

McRAE v. JUZAN ET AL.

1. The Register of a Court of Chancery is bound to furnish the copy of a bill to the defendant, together with the *subpoena*, although the plaintiff may not have paid him his fees therefor.

At a special term of the Court of Chancery, sitting at Mobile, a motion was made requiring the appellant, who was the Register of that Court, to show cause why he had not issued a copy of the bill with the *subpæna*, to be served on the defendant in the case of Pierre Juzan et al v. Theo. L. Toulmin. In answer to the motion the appellant showed for cause that the complainants refused on demand to pay him his fees for these services. The Chancellor adjudged the cause shown to be insufficient, and directed the Register to issue a *subpæna* accompanied with a copy of the bill.

To revise this order the Register prayed and obtained an appeal to this Court.

CAMPBELL, for the appellant.

J. GAYLE, for the appellees.

COLLIER, C. J.—The only question in this case is, whether the Clerks of Courts previous, and as an inducement to the performance of the duties devolved on them by law, are enti-

tled to demand their fees? The solution of this question must depend upon the construction of our statutes on the subject. Ordinarily, at law, the unsuccessful party is charged with costs and an execution issues for their collection; but in equity either party is chargeable with their payment at the discretion of the Court. [Act of 1807, Aik. Dig. 261, 286.] So if in a suit determined, the execution shall be returned "no property found, out of which the costs can be collected, an execution may forthwith issue against the plaintiff for all costs thereon which may have been created by him. [Act of 1826.] *Further*, the Clerk, or any person interested, is authorized to require security for costs of a plaintiff who may reside out of State at the time of the commencement of a suit, or remove from the same during its pendency—not only for the costs which may be awarded to the defendant, but also for the fees that are, or may become, due to the officers of Court. [Acts of 1807 and 1812, Aik. Dig. 263.]

Even if it were *res integra*, it might well be questioned whether the statutes we have cited did not relieve the parties from the payment of the *expensa litis*, as the suit progressed. But we cannot regard the question as a new one. It has been the universal practice in this State, since the organization of its government, for clerks and sheriffs not to demand their fees for services rendered in a cause until the same was decided. This practice must be considered as strong persuasive evidence of what the legislature intended, and cannot now be departed from, unless we were satisfied that it was founded upon an obvious misconstruction of law. It follows that the order of the Chancellor is correct, and is consequently affirmed.

SMITH v. LOCKE.

1. The sheriff levied on twenty-five bales of cotton in a ware-house, as the property of J. against whom he had an execution. S. setting up a claim to fifteen bales of the cotton, procured fifteen other bales of cotton, and having obliterated the marks and brands, marked them to resemble the cotton levied on and substituted them secretly and without force, for fifteen bales of the cotton levied on, which he removed, and on the day of the sale claimed the cotton and forbade the sale. Held—

1st. That if the sheriff elected to receive the substituted cotton for that originally levied on, S. was concluded by his own act from denying that it was not the cotton levied on.

2d. That on a suit by S. against the sheriff for the fifteen bales of cotton, the only question was whether the property in the fifteen bales levied on was in S. or in the defendant in execution when the execution came into the sheriff's hands.

3d. When the sheriff levies on property which does not belong to the defendant in execution, the true owner may retake possession if he can do so without committing a trespass.

ERROR to the County Court of Greene.

Trover by the plaintiff against the defendant in error, for fifteen bales of cotton.

Upon the trial it appeared that the defendant, as sheriff of Greene county, had levied on twenty-five bales of cotton, as the property of one Isaac Jordan, against whom he had an execution, and left the cotton so levied on, in the ware-house where he found it. It also appeared that the plaintiff claimed fifteen bales of the cotton by purchase from Jordan, before the levy, but whether before or after the execution came to the sheriff's hands, was not shown. It was also in proof that the plaintiff purchased from one McDonald fifteen bales of cotton, lying in the same ware-house, the marks and brands of which he obliterated, and put thereon marks and brands similar to those on the twenty-five bales of cotton levied on, and substituted the fifteen bales so altered and marked for fifteen bales of the cotton levied on, which he removed secretly and without the knowledge of the sheriff, but peaceably from the ware-house. On the day of the sale of the cotton the plaintiff claim-

ed the fifteen bales of cotton so substituted, and forbade the sale, showing that they were distinguishable from the remaining ten bales. There was no evidence that the plaintiff intended to practice a fraud on McDonald, or that the latter knew of his intention, the contract between them being, that he would pay for the cotton if he used it, if not he would return it. The sheriff proceeded and sold the cotton.

The Court charged the jury that if the plaintiff purchased the cotton from McDonald with some vague and general intent to use the cotton in a fraudulent and improper manner, it could not prevent the title from vesting in him. But that if the plaintiff purchased the cotton from McDonald with a fraudulent intent and on purpose to deceive the defendant, or to hinder and obstruct the due execution of legal process, he was not entitled to recover in this action, though McDonald was not defrauded or injured and had no knowledge of any fraudulent intent or purpose of the plaintiff—to which the plaintiff excepted, and judgment being rendered in favor of the defendant the charge is now assigned for error.

THORNTON and J. B. CLARKE, for plaintiff in error, insisted that the plaintiff had a right to take his own property peaceably from the sheriff, who was a trespasser in taking it, and that it made no difference that an artifice was resorted to, to obtain it. The charge of the Court that the intention of the plaintiff in making the purchase from McDonald could affect his title to the property is clearly wrong, and the cause must reversed.

JONES, contra, maintained that the plaintiff could not recover, because he claimed title to the property under a contract entered into for the purpose of defrauding the defendant and the case was not altered though there was no intention to defraud McDonald, as there was an intention to impede due course of public justice. [Chitty on Con. 224; Comyn on Con. 62; 11 Wheaton, 258; 1 Ala. Rep. 34; 2 Wilson 341.]

That the substitution of the fifteen bales for those levied on, was, under the circumstances, an exchange if the sheriff chose so to consider it, and the plaintiff could not be heard to say that

Smith v. Locke.

the sheriff had no right to sell. [16 Wendell, 514; 9 Cowen, 274; 7 Com. Dig. 521; 20 Viner's Ab. 515; 3 Camp. 108.]

ORMOND, J.—The delivery of an execution to the sheriff is an authority to take and sell a sufficiency of the property of the defendant in the execution to satisfy it, but he acts at his peril, and if he takes the property of another he is a trespasser.

When one is unjustly deprived of his property the law permits him to redress himself by the recaption of the property if he can do it without a trespass or breach of the peace, and this rule applies as well to a sheriff who takes property which does not belong to the defendant in execution as to any other person.

In the case of the Earl of Bristol v. Wilsmore and Page, [1 Barn. & Cress. 514,] it was held that where the sheriff had levied on a hundred head of sheep in the possession of the defendant in execution, which he had obtained by fraud, and which the former owner had by a stratagem regained the possession of, after the levy, that in the action by the sheriff against him, he could shew that the defendant in execution had obtained possession of the sheep with a preconceived design of not paying for them, that in such a case, as the property in the sheep did not pass to him, the sheriff had no right to levy on them as his sheep, and of course had no right to retain them against the real owner.

This is a very strong case to show that the right of recaption, when one has been deprived of his property unjustly exists against the sheriff as strongly as it does against any other person.

If then, the plaintiff had, under claim of title, possessed himself of the fifteen bales of cotton, after the levy, and the sheriff had brought trover to recover them, the question would have been whether the cotton was the property of Jordan, the defendant in execution, or of the plaintiff? Is the case varied by the substitution by the plaintiff of the fifteen bales of cotton obtained from McDonald for that originally levied on?

We must not permit the indignation which it is natural should be felt by the deception attempted in this case by the

plaintiff to warp our judgment, no matter how objectionable in a moral point of view his conduct may be, he has a right to insist that strict justice should be administered to him.

Where one intermixes his property with that of another, such as money, corn or hay, without his approbation or consent the law gives the entire property, without any account to him whose original dominion is invaded and endeavored to be rendered uncertain without his consent. [2 Black. Com. 406.] The design of the law is to prevent fraud, and although in strictness it applies only to those cases where from the minuteness of the several parts, or their resemblance to each other, the respective property of each cannot be distinguished in the general mass, yet the principle applies to this case. Where one throws gold into the crucible of another in which he is melting gold, he cannot reclaim his property, though he might be able to show the exact amount thus thrown in, nor will the plaintiff in this case be permitted to show that the cotton which he has substituted for that levied on by the sheriff is capable of being distinguished from the rest of the cotton. If the sheriff elects so to consider it, he may treat it as the cotton levied on by him, and the plaintiff will be concluded by his own act from controverting that fact.

Such being the law, the only question before the jury was, whether the fifteen bales of cotton levied on by the sheriff, as the property of Jordan, and claimed by the plaintiff was his property at the time the execution came to the sheriff's hands. It was wholly unimportant with what view the purchase was made from McDonald of the fifteen bales of cotton; whether such purchase was *bona fide* or made with intent to obstruct the due execution of legal process, was a matter entirely foreign to the question before the jury, which, as already stated was, whether that portion of the cotton levied on by the sheriff as the property of Jordan, which was claimed by the plaintiff, was or not his property when the execution came to the hands of the sheriff.

The determination of the question submitted to the jury by the Court, and upon which their verdict was made to depend, did not lead to the consequence supposed by the Court, for notwithstanding the purchase from McDonald may have been

Woodruff v. The Bank of the State of Alabama et als.

with a fraudulent intent, the plaintiff's title to fifteen bales of the cotton levied on may have been perfect when the supposed *lien* of the execution attached.

For this error in the charge of the Court the judgment must be reversed and the cause remanded.

WOODRUFF v. THE BANK OF THE STATE OF
ALABAMA ET AL.

1. When Commissioners appointed by a Judge of the Supreme or Circuit Court to settle an estate in which the Judge of the County Court is interested, act under the appointment, the record of the County Court should set out the commission under which they assume to act.
2. Such Commissioners are invested with all the powers appertaining to the County Judge with reference to the estate committed to their supervision.
3. They are authorized to make a final distribution of the assets among the creditors, and to render a decree for the amount due to each person.
4. When such a decree is made, a short stay of execution may be allowed to give the administrator the opportunity to pay the several creditors, without incurring the costs of an execution.

WRIT of Error to the County Court of Shelby County.

The first matter which appears in this record is a report of certain Commissioners, setting out that they were appointed by the Hon. P. T. Harris, Judge of the Circuit Court for this State, Commissioners to settle and adjust the claims against the estate of George L. Medlock, that they met at Montevallo, on the 9th day of October, 1840, and from the vouchers and assets of the said estate, presented to them by Woodruff, the administrator, they proceeded to execute the duties assigned to them as follows:

The report then sets out the names of the several creditors of the estate whose claims are allowed, stating briefly the nature of the claims, with the amount due thereon for the principal in one column, and for the interest in another.

Among the claims thus allowed are those specified as Bank judgments, but it is not designated what Bank they are in favor of. The aggregate amount of the claims thus allowed is \$7,254 75.

The entire amount of assets is stated at \$3,241 75, making according to the report, a dividend of forty-four and one fourth per cent. on the claims allowed, and leaving in the hands of the administrator \$31 50.

The report then proceeds to set out a statement of the claims disallowed by the Commissioners. It does not appear when this report was returned to the County Court, or whether the Commissioners themselves constituted a special Court under the statute.

At the February term, 1841, the following entry was made :

" This day came into open Court Joseph Woodruff, the administrator of the estate of George L. Medlock, deceased, and made settlement of the estate in the following manner, to wit : By report of Edmund King, John S. Storrs and Samuel Bowden, Commissioners, it appears that the liabilities of said estate amount to \$7,254 75, that the assets in the hands of the administrator amount to \$3,241 75, making a dividend of forty-four and one-fourth cents on the dollar, and leaving \$31 50 in the hands of the administrator—and all other claims rejected, which will more fully appear by the report of the Commissioners marked (A.) which is ordered to be recorded ; and on the application of the administrator it is ordered that he pay all the claims allowed against the said estate in the Clerk's office, on or before the first Monday of March next, if not, execution to issue on each claim for its proportion according to report marked (A.)

The administrator prosecutes his writ of error to reverse those proceedings, and all the creditors whose claims appear as allowed in the report of the Commissioners are made defendants to the suit.

The assignment of error insists that the judgment is erroneous—

1. Because there was no notice given of the time and place of the meeting of the Commissioners.
2. Because the claims allowed were not authenticated.

Woodruff v. The Bank of the State of Alabama et als.

3. Because the Commissioners had no authority to settle and adjust the claims.

4. Because they did not receive and examine the claims in the Clerk's office.

5. They did not set forth the sum allowed on each claim.

6. They did not return under oath a list of all claims, &c. laid before them.

7. The decree of final settlement is uncertain.

8. It does not specify in whose favor, nor for what sum, execution may issue.

9. It is not in conformity to the statute.

SHORTRIDGE, for the plaintiff in error.

B. F. PORTER, contra.

GOLDTHWAITE, J.—The proceedings in this case, so far as they relate to the settlement of the estate by Commissioners, most probably had their origin in consequence of some interest which the Judge of the County Court had in the estate to be settled, either as counsel or otherwise. We say most probably, because it is only in such cases that a Judge of the Circuit Court is authorized to issue a commission. Upon the presumption that our supposition is correct, and because these proceedings if in fact had under the statute which will presently be recited, are at present so fatally defective that no judgment can be rendered upon the record. We consider it proper to state what the correct practice under this statute is, and shall then show in what respect this record differs from it.

The statute provides, that in all settlements hereafter to be made by executors, administrators or guardians, with the Orphans Court, in which the Judge of the said Court may have been employed as counsel, or may otherwise be interested in such settlement, it shall be the duty of the said Judge to give immediate information of the fact to one of the Judges of the Supreme or Circuit Court, who shall thereupon issue a commission to three persons of the proper county, directing and empowering them to proceed to make said settlement¹ under the rules and regulations now prescribed by law. Such settlement when made as aforesaid shall be duly recorded by the Clerk of the said Court, and shall have all the force and effect

of settlements made by the Judge of said Orphans' Court.— [Dig. 252, §41, 42.]

In *Lister v. Vivian*, [8 Porter, 375,] where the construction of the same statute was involved, we held it necessary that the commission issued by the Judge of the Circuit Court should appear of record, it being a special authority, and the only warrant for the acts of the Commissioners; and also that its existence and legality could not be supplied by intendment or inferred from a recital in the minutes of the Clerk or in the report of the Commissioners, but the commission itself should appear, that it might be seen whether it furnished a warrant for the acts done under its authority.

In proceedings subsequent to and under the commission, the first step proper to be taken is to enter it upon the minutes of the Orphans' Court, and then the Commissioners are at once invested with all the powers and duties of the Judge of the County Court so far as applicable or necessary to a final settlement of the particular estate, and their mode of proceeding with reference to the estate will be precisely the same as that pursued by Judges of the County Court in other cases.

In the case of *Lister v. Vivian*, it was considered an open question whether such Commissioners can render a final decree, but we are satisfied they have the same powers in this respect as the County Judge, under the acts of 1822 and 1830. [Dig. 252, §34, 37.] This decree when made ought to ascertain with precision the amount for which a recovery is given in favor of each individual, and this amount should be for the true dividend produced by a distribution of the assets equally to the creditors, unless a distinction is required to be made in favor of some of the preferred debts under the statute, such as funeral expenses, &c.

Upon the rendition of such a decree it might be proper to provide a stay of execution for some short period in order that the administrator should have the opportunity to pay the respective creditors without the costs attendant upon an execution. On the rendition of such a decree, and when recorded, the Clerk of the County Court would be authorised to issue execution after the expiration of the stay.

It will be seen upon examination of the statement prefixed, that those proceedings do not conform to the opinions now ex-

Gary et al v. Wood.

pressed, as the commission is not set forth on the record, nor is there any decree in point of fact, for the report merely ascertains the debts allowed, the assets and the dividend which, under the report, would be coming to each, but it is entirely deficient in ascertaining who the creditors are that are entitled to judgment, and particularly in omitting to ascertain what Bank is intended as the owner of certain judgments.

The report not being entitled to any consideration as a decree there was no necessity or propriety in suing out a writ of error; the proper remedy to prevent injurious effects from executions is to supersede them when irregularly issued.

The writ of error must be dismissed, and it would be prudent for the Commissioners to amend their report and render a final decree in favor of creditors before the latter seek to sue out execution.

GARY ET AL V. WOOD.

1. Where an issue is joined upon a suggestion that the sheriff could, with due diligence have made the amount of an execution, and a general verdict returned in favor of the plaintiff, the legal inference is, that the jury have affirmed the truth of the facts alledged in the suggestion; and if the suggestion is sufficient, a judgment may be rendered thereon.
2. When the judgment entry recites that an issue was joined, but the record does not contain a plea, it will be intended that the plea was a mere denial of the case stated by the plaintiff.
3. Where the service of notice of a suggestion was effected on the sheriff only, and the judgment entry recites that "the defendant came by his attorney, &c." and a judgment is rendered *on verdict* against "the defendant," the inference is, that the sheriff is the party against whom the recovery is had; and his sureties can't join with him in the prosecution of a writ of error.

This was a suggestion in the County Court of Sumter by the defendant in error against Gary, as sheriff of that county and his sureties, that the sheriff could, by due diligence, have made the amount of an execution issued from that Court and placed

in his hands, at the suit of the defendant in error against John Hillman for the amount of one hundred and thirty-one dollars damages, and thirteen dollars and sixty-eight cents costs of suit.

The service of notice of the suggestion is acknowledged by the sheriff—there is no plea in the record, but a judgment was rendered as follows :

“Whereupon came the parties, the plaintiff by attorney, and the defendant by his attorney, as well as in his own proper person, and there also came a jury, to wit : Robert Arrington and eleven others, who being sworn well and truly to try the issue joined, returned a verdict in these words, ‘We, the jury, find for the plaintiff, and assess his damages to one hundred and sixty-three 93-100 dollars.’ It is therefore considered by the Court, that the plaintiffs recover against the defendant the sum of one hundred and sixty three 93-100 dollars, the damages aforesaid, by the jury aforesaid assessed, together with his costs by him about his motion in this behalf expended.”

To revise this judgment a writ of error has been prosecuted to this Court.

BLISS & BALDWIN, for the plaintiff in error—

1. It does not appear from the record that the writ of execution named in the suggestion was placed in the hands of Gary, or that he was sheriff.

2. It does not appear to have been proved that the money could have been made on the execution by due diligence. In fact it does not appear that any of the allegations of the notice or suggestion were satisfactorily shown to the Court or jury.

3. Lastly—the judgment is against one only of the defendants below, but which one no where appears on the record.

STEELE & METCALF, for the defendant.

COLLIER, C. J.—1. The suggestion of the want of diligence on the part of the sheriff expressly asserts that the execution came to the hands of Mathias E. Gary, on the first day of April, 1841, and that he was then sheriff of Sumter county. In truth it alledges every fact with precision which was ne-

cessary to invest the Court with the summary jurisdiction provided by statute.

2. In respect to the second point made by the plaintiff in error, it is insisted that it is not enough that the suggestion be complete in its recitals and allegations, but the judgment itself must set out every fact necessary to authorize the procedure. A *single* remark in the opinion of the Court in *Curry v. The Bank of Mobile*, [8 Porter's Rep. 372,] may favor this argument, but the subsequent case of *Adams et al v. White*, [2 Ala. Rep. 37,] shows that it cannot be sustained. In the latter case the proceeding was a failure to make the money on an execution, &c. and the judgment was by default. The judgment, after reciting the appearance of the plaintiff and the default of the defendant, states that, "on motion and suggestion to the Court, that the money could have been made by due diligence thereupon came a jury, &c. who say they find for the plaintiff the sum of, &c. The Court say, "If the sheriff had appeared and contested the allegations of the suggestion, the finding of the jury, under the authority of the case of *Curry v. The Bank of Mobile*, [8 Porter, 360,] might have been considered sufficient."

In the case at bar, the record does not inform us what was the character of the issue on which the suggestion was tried; yet, in suits prosecuted in the usual mode, where the record does not impart information on this point, it has been repeatedly holden that it will be intended the issue was a mere denial of the complaint. By analogy, we must infer that the question tried by the jury was, whether the suggestion was true in fact. Taking this to be law, and the conclusion follows that the verdict affirms the truth of every material fact alledged in the suggestion. And issue being taken on the suggestion, it must be regarded as a part of the record, and the facts which it discloses will be quite as effectual to sustain the judgment as if shown by the entry of the Court on its minutes.

3. The notice of the suggestion does not appear to have been given to any other person than the sheriff himself, and though it was competent to have rendered a judgment against the sureties for the default of their principal, [*Reid et al v. Jackson*, 1 Ala. Rep. N. S. 207,] yet it must be intended that the recital in the judgment entry, that the *defendant came by*

Hazard v. The Planters' and Merchants' Bank.

his attorney. as well as in his own proper person, indicates the appearance of the sheriff only. In Catlin, Peeples & Co. v. Gilder's ex'rs. [3 Ala. Rep. 536,] upon the margin of the judgment entry, the suit was stated against the defendants in their firm name; one of the defendants only had been served with process, who pleaded; the judgment recited that the parties came by their attorneys, and the jury were empannelled to try the issue joined. The Court held that the reasonable inference was, that they only appeared who were parties to the issue tried. To the same effect is Puckett v. Pope, [3 Ala. Rep. 552.]

The defendant, against whom the judgment is rendered, is not mentioned by name, but as the sureties did not appear, it is clear that they are not parties to it. If it could be regarded as a judgment against them it would be erroneous, for the omission to show by the record that it was proved to the satisfaction of the County Court, that they were the sureties of the sheriff. [McRae et al v. Colclough, 2 Porter's Rep. 74.]

If an execution was issued on the judgment against the sheriff and his sureties, it would be entirely competent for the latter to obtain a *supersedeas* and quash it on motion, as the judgment would not warrant such an execution. But the sureties cannot join with their principal in the prosecution of a writ of error to revise a judgment to which they are not parties—and for this misjoinder the writ of error is dismissed.

HAZARD v. THE PLANTERS' AND MERCHANTS' BANK.

1. A note payable to "the President and Directors of the Planters' and Merchants' Bank of Mobile," is in its legal effect a note payable to the corporation, and may be sued on as such.

ERROR to the Circuit Court of Mobile.

Morris v. Harvey.

J. A. CAMPBELL, for the plaintiff in error.

ORMOND, J.—This is an action instituted by motion on the part of the Bank against the plaintiffs in error as makers of a promissory note, by which they promised to pay the amount for which the note is given to “the President and Directors of the Planters’ and Merchants’ Bank of Mobile,” and the objection is that the note is not payable to the corporation nor any proof that it was the owner of the note.

The corporate name of the Bank is “The Planters’ and Merchants’ Bank of Mobile,” and the necessary intendment is that this note is payable to the corporation. The President and Directors are those who manage its concerns, and it would be most unreasonable to suppose that the note was meant to be for their benefit as individuals. The case of *Alston v. Heartman*, [2 Ala. Rep. 699,] is in principle like this, and the cases there cited, especially *Gilmore v. Pope*, [5 Mass. 491,] expressly in point.

Let the judgment be affirmed.

MORRIS v. HARVEY.

1. Where a father conveys all his estate to his son, under circumstances which possibly might lead to the conclusion that a trust was intended for the grantor, but the transaction is free from fraud, the deed cannot be avoided or personal property conveyed by it recovered, in a court of law.
2. If the conveyance under such circumstances express a consideration which was never paid, or if the same was in fact paid, these circumstances will not, as between the parties avoid the deed.

WRIT of Error to the Circuit Court of Talladega county.

Detinue for a slave. The cause was determined on a demurrer to the evidence and upon the general issue.

Morris v. Harvey.

The evidence is stated at large, but may be condensed into the following facts:

Charles Harvey, the plaintiff in the present action on the 26th December, 1840, was in custody of one Jeter, on a peace warrant, issued by a Justice of the Peace, at the suit of his wife. Jeter was specially deputed to make the arrest, and two of his sons had married daughters of Harvey. When before the Justice of the Peace, Harvey offered his son Thomas as his surety, but the Justice refused to take him, alledging he was not responsible in point of property. The elder Harvey then said he would make him able, and calling on a witness declared in the presence of those then there, as well as in the presence of his son, that he gave his son every thing he had. The Justice continued his refusal, and another person then present was called upon by the elder Harvey, but this person declined to be his surety, alledging as a reason that he had seen the wife of Harvey, who bore the marks of much violence.

On Sunday the 27th December, both of the Harveys came to the house of one Hagerty, and informed him they had been there the day before, to procure him to be the elder Harvey's surety on the peace warrant—that the elder Harvey had broken from Jeter's custody, and they wished Hagerty to draw up some instrument of writing conveying the real and personal estate of the elder to the younger Harvey, the former saying he intended going to Georgia, and did not wish his other children to have any of his property, or to scatter it.

Two deeds were then drawn, though one of them was possibly dated as of another day, by agreement of both parties; one of these deeds was for land, on which the elder Harvey resided, worth two or three dollars per acres; the other, produced in evidence at the request of the plaintiff, was a release or quit claim, dated the 27th December, 1840, executed by the elder to the younger Harvey, for the slave sued for and nine others. The consideration named in the deed is twelve hundred dollars, acknowledged to be paid, or secured to be paid, by the releasee to the releasor. No money was paid by the younger to the elder Harvey, but it was understood the former was to pay the debts due from the latter. These debts were believed not to exceed twenty-five dollars, and there was no proof that the younger Harvey had paid any of them. The slaves men-

tioned in the release, at its execution, were worth thirty-eight hundred dollars.

The elder Harvey, after the execution of the deeds, started for Georgia, but returned about three weeks afterwards, and was then seen in custody of the officer, who appeared to be carrying him to the jail of Montgomery county.

A short time, perhaps a week, before the deeds were thus executed, the younger Harvey called on Hagerty, to ascertain if he would take Harvey's mother, and let her reside with him. Hagerty refused, and she was afterwards in the family of one of the Jeters, her son-in-law. The younger Harvey had said he had loaned to this Jeter some of the slaves mentioned in the deed of release, alledging as his reason for the loan, that he regarded it but right that the other children should share a part of the benefit of the property. He had also said that he had received a proposition through Hagerty, from his father, to compromise—this proposition was, for the younger Harvey to keep the slaves, and that the elder should have the land. The younger Harvey had inquired of one Taylor whether a deed made on Sunday and without consideration would stand in law, saying this had been urged upon him as reasons for a compromise. The compromise was refused by the younger Harvey, and his only object in stating the matter seemed to be, a wish to ascertain Taylor's opinion upon the validity of the deeds.

The elder Harvey is a man of ordinary shrewdness, but scarcely so shrewd as his son; he was between fifty and sixty years of age at the execution of the deeds, and can neither read nor write. The younger Harvey is a married man, and at the time of the transaction lived about a quarter of a mile from the then residence of his father; it was not known to any of the witnesses that he had offered to take his mother to his house; his father is apparently without property, living with some person in the neighborhood of his son, and is working for his subsistence.

The slaves were not present when the deed of release was executed, nor were they then delivered, nor at any other time within the knowledge of the subscribing witness.

The slave in controversy having been taken into possession by the younger Harvey, was carried from Montgomery to

Morris v. Harvey.

Talladega county and hired to the defendant. The value of the slave and of his services, as well as the defendant's refusal to deliver him to the plaintiff was in evidence.

To this evidence the defendant demurred, and the plaintiff joined; thereupon judgment was given for the plaintiff, which the defendant now seeks to reverse.

CHILTON, for the plaintiff in error, insisted that the elder Harvey was estopped from disputing either the deed or its consideration. [16 John. 116; Powell v. Monson, 3 Mason, 347; Jackson v. Ball, 1 John. cases, 90; Oakley v. Berman, 21 Wend. 585; 8 Cowen, 406.]

No fraud is shown—no means of deception resorted to—the deed was made understandingly, and whether with or without consideration is valid as between the parties to this action.—Jackson v. King, 4 Cowen, 207; 4 Wend. 474.]

It cannot be pretended there was a want of capacity in the elder Harvey to make the deed. To make such a defence at law the loss of understanding must be entire. [4 Cowen, 209.] Nor does the circumstance that he is unable to read or write vitiate the deed, unless imposition could be presumed. [2 John. 404.]

The execution of the deed on the Sabbath day does not render it void. [Thompson v. Cerner, 9 Cowen, 255.]

RICE, contra, insisted that a jury would have been authorized to infer fraud, or at least undue influence, from the circumstances in evidence, and either will avoid the deed as between the parties. [3 Cowen, 537, 571.]

The consideration is falsely stated, for it is clear that no money was paid, or secured to be paid. This is a fraud on the elder Harvey.

In a case of fraud the party is not compelled to go into equity to rescind the conveyance, but may sue at law. [Alexander v. Dennis, 9 Porter, 174; Swift v. Fitzhugh, 9 Porter, 40; Mobile Cotton Press v. Magee, *ib.* 679; Hinds v. Longworth, 11 Wheat.; Blocker v. Burruss, 2 Ala. Rep. 354.]

A deed of bargain and sale without a consideration is void, [Church. Digest, 322,] and the deed in this case cannot be considered in a more favorable view.

GOLDTHWAITE, J.—The right of the defendant to demur to the evidence does not appear to have been contested in the Court below; if the plaintiff in this case had refused to join in the demurrer, it may admit of doubt whether a joinder ought to have been compelled, inasmuch as the evidence offered to impeach the deed for fraud is entirely parol, and also loose, indefinite and wholly circumstantial. We mention it at this time for the purpose of indicating that it has never been held by this Court, that every case may be withdrawn from the jury, and the facts referred to the Court by a demurrer to evidence.

The defendant below insists here, that nothing whatever was shown in evidence which can rightfully impair the title of the younger Harvey to the slave in controversy; and the plaintiff contends that the deed is void for fraud in its execution; or if it was not fraudulent that it has no adequate consideration to support it.

We have carefully examined the evidence again and again, for any fact or circumstance from which fraud might legally be inferred, but can find none. It is true the plaintiff is shown to be an illiterate old man, who can neither read nor write; but it is certain that the deed was drawn at his own request, and that it fully conforms to his wishes, as expressed previous to its execution. If the deed was not read to him it cannot be doubted from what the subscribing witness relates, that he was fully acquainted with its contents, and intended it to prevent his other children from getting any of his property, or from scattering it. Conceding that it is possible the deeds were made with no intention to invest the son with the absolute property either in the land or slaves, but were intended to invest the son with the mere legal title for the purpose of keeping the property together and protecting it during the absence of the father, if a trust was thus created in favor of the elder Harvey, it cannot be enforced at law, nor will the trust operate as a destruction of the deed. We do not understand the defendant in error as insisting that the trust could be used to defeat the deed, but that it is a strong evidence of fraud that this trust was not declared on the face of the instrument itself. In answer to this it need only be said that if the conversation which is shown to have taken place between the parties and the witness who

Batre v. Simpson.

drew the deeds, evinces that a *trust*, and not an absolute sale, was intended; yet also shows the elder Harvey intended to convey the title of his property to his son, and the deed is effectual for that purpose. Whether this conveyance was, as between the parties, intended to be governed, limited or otherwise controlled by a trust, is one of the proper functions of a Court of Equity to inquire. We think there is nothing in the case to warrant the inference of fraud in the execution of the deed, and therefore it cannot be impeached, however inconsistent the acts of the grantee may have been to the trust, if any existed. [Swift v. Fitzhugh, 9 Porter, 39; Taylor v. King, 6 Mun. 366; Watt v. Grove, 2 Sch. & Lef. 501; English v. Lane, 1 Porter, 328.] The other question, as to the inadequacy or want of consideration is more clear, as the current of decision is uniform to show that this is not the subject of inquiry at law. [Powell v. Monson, 3 Mason, 347; Jackson v. Bell, 1 John. cases, 90; Oakley v. Mœrman, 21 Wend. 585; McCutchen v. McCutchen, 9 Porter, 650.]

Our conclusion is that the judgment on the demurrer to the evidence is erroneous; it is therefore reversed and the cause remanded.

BATRE v. SIMPSON.

1. Where a contract was made for the purchase of ninety bales of cotton, part at one price and part at another, all of which had not been weighed, it must be regarded as an entire contract; and if the cotton was destroyed before it was all weighed, the plaintiff is not entitled to recover the price of any part of it. And the willingness of the purchaser to have taken less or more than the plaintiff agreed to sell him, cannot change the character of the contract.
2. Merely sending a delivery order for cotton on a warehouseman to the purchaser without solicitation on his part, all of which is not in a deliverable state, will not in the absence of other proof, transfer the property so as to put the cotton at the purchaser's risk.
3. Books of accounts kept by a deceased clerk, and other entries or memoranda, made in the course of business or duty, by any one who would at the time have

Batre v. Simpson.

been a competent witness to the fact which he registers, are admissible evidence; and where the book or memoranda in which the entry is made, is lost, then a copy, supported by the oath of the party who copied it, is admissible.

Writ of Error to the Circuit Court of Mobile.

This was an action of *assumpsit* by the defendant in error against the plaintiff, to recover the price of cotton sold and delivered. The cause was tried on the *general issue*. On the trial it was proved that one Gary, a cotton broker of Mobile was employed by the defendant to purchase cotton for him, and on Saturday, the 31st March, 1838, applied to the plaintiff, a cotton factor of that city, to purchase of him the cotton in question. The plaintiff exhibited samples of the cotton he had on hand, and Gary agreed to take ninety bales—for the price of which the action is brought—took the marks thereof, and stipulated the price at sixteen cents for a part, and fifteen and three-fourth cents for the residue, *per pound*. The keeper of the warehouse in which the cotton was stored was present when the contract was made, and to an inquiry addressed by Gary to the plaintiff, stated that the cotton could not be delivered until Monday, some of it, or twenty-four bales, had not been weighed. In the afternoon of the same day the broker sent for the samples of the cotton he had agreed to take, and they were sent to him, together with an order to the warehouseman to deliver the cotton to Gary. The order was retained by Gary, without presenting it to the warehouseman, or in any manner objecting to it.

The cotton in question consisted of the crops or parts of crops of three or more planters, with distinct marks on each parcel, and was received by the plaintiff about three weeks previously for sale. At the time of its reception by the plaintiff sixty-six bales of the cotton were weighed by the warehouseman with whom it was stored, he being a weigher of cotton in Mobile. The residue was not weighed while in plaintiff's possession, nor was there any evidence of what it weighed.

The cotton was not weighed after the bargain between Gary and the plaintiff, and the former being examined as a witness stated that he had never seen any table of the weights of any part of the cotton, and that he was not in the habit when he purchased cotton, to call for and examine the weights previ-

ously ascertained. On Sunday night next succeeding the contract, all the cotton was consumed by fire, before the removal of any part from the warehouse.

No part of the purchase money was paid, but sales of cotton were usually made for cash, which was to be paid in two or three days. Gary in his evidence stated that the number of bales was immaterial to him, that he may have had orders for five hundred bales on that day, and would have purchased a greater or less quantity than the ninety bales, if the prices and quality suited; but nothing of this kind was said at the time of the contract.

The Court charged the jury—1. Where an agreement is made by a broker for the purchase of cotton upon an exhibition of samples, if the cotton is ready for delivery, and an order on the warehouseman is given by the seller to the buyer, from that time it is placed at the buyer's risk. But if at the time of the agreement, it is stated that the cotton cannot be delivered for two days, and after the broker left the vendor, the latter, without being requested to do so, in the afternoon of the same day, sent the delivery order to the former, it forms a contract for the sale and delivery of the cotton to be executed two days thereafter.

At the request of the defendant's counsel, the Court instructed the jury—

2. The fact that part of the cotton was weighed by the factor, or his warehouseman, at the time of its receipt, did not form the criterion of the weights, unless the purchaser consented thus to receive it.

3. If the jury should believe, that at the time Gary made the contract, nothing was said about the weights, and none were disclosed to him, and he agreed to purchase at a specific price *per pound*, if the cotton was destroyed before the weights were ascertained by the parties, the loss must fall on the vendor.

The defendant's counsel prayed the Court to instruct the jury as follows:

4. If the contract was for three lots of cotton of specific marks, at a certain price *per pound*, the cotton remained at the risk of the seller until the weights were ascertained—this

charge the Court gave with the addition of the words "as to the cotton not weighed."

5. If the order to the warehouseman was for all the cotton, and a part had not been weighed, then no recovery can be had, unless a specific portion was taken into possession upon the delivery of the order. This charge the Court refused to give.

6. If the contract was for cotton of specific marks, and for a specific number of bales of those marks, the entire quantity must be delivered; and if, before any portion was removed and the weights of all ascertained, the whole was destroyed, the vendor must sustain the loss. This charge the Court also refused to give.

The plaintiff's counsel requested the Court to charge the jury as follows:

7. That although at the time the contract was made for the purchase of the cotton, the broker was informed that twenty-four bales were not weighed, and on that account the whole could not be delivered till Monday following; yet, if on the same evening the defendant sent for the samples, and with the samples the plaintiff sent an order for the delivery according to contract, the sending of the samples and order to the defendant, and the retention of the same by him, may, or may not, as the jury think proper, be inferred by them to be an agreement to receive the cotton according to the order. This charge was given in the terms in which it was asked.

8. That if the jury believe the cotton was weighed by a competent public weigher, and they have proof of those weights, they are a criterion in this case, although there was no express assent by the defendant. This instruction was also given.

To the charges given and the refusal to charge as prayed, the defendant excepted, &c.

Further, the plaintiff proved that Graham, the weigher and warehouseman was dead, and his book was destroyed by some one of the fires that occurred in Mobile, and then offered a witness to prove that after the destruction of the cotton a transcript was made by the witness from the book of Graham; which the witness produced and offered to read. To this evidence the defendant objected, but the objection was overruled

Batre v. Simpson.

and the paper read to the jury; and thereupon he excepted, &c. All of which exceptions are duly certified.

A verdict being returned for the plaintiff for the price of the sixty-six bales of cotton and judgment thereupon rendered, the defendant has prosecuted his writ of error, &c.

CAMPBELL, for the plaintiff in error. The contract was entire for the purchase of ninety bales of cotton, a part at sixteen and the residue at fifteen and three-fourth cents, and the defendant was not obliged to accept any part unless the whole was tendered to him. [1 Ala. Rep. N. S. 140; 13 Wendell's Rep. 358; 22 ib. 658; 11 Eng. C. L. Rep. 256; 16 ib. 247; 17 ib. 401.] If a different principle were recognized, the defendant below might have been compelled to accept any portion of the cotton which was delivered, though the withholding of the remainder might change the average price at which the purchase was made.

The weighing was intended to ascertain the amount to be paid for the cotton, and the weights ascertained previous to the purchase were not obligatory on the purchaser—he had never assented to their correctness. [6 Cow. Rep. 254; 7 Dana Rep. 58; 6 Pick. Rep. 280; 14 Wend. Rep. 31.]

The delivery order to the warehouseman did not transfer the property previous to presentment or acceptance. [Chitty on Con. 115; 7 Gill and Johns. Rep. 406; 10 Eng. C. L. Rep. 138; 2 Comp. Rep. 441, 443.]

He referred to his argument in *Magee v. Billingsley*, 3 Ala. Rep. 679, and cases there cited.

HOPKINS and LESESNE, for the defendant. The contract was not entire; for the broker expressly states that his purchase was not induced by the exact number of bales which he agreed to take. [1 Camp. Rep. 54; 17 Eng. C. Rep. 19.] His orders for the day may have amounted to five hundred bales or more, and he would have bought more or less than ninety. At common law, delivery is not necessary to consummate a sale; and in the present case the sale was perfect as to all the cotton that was in a deliverable state as soon as the delivery order was accepted by the buyer; and this is the law even as to the twenty-four bales which was unweighed. [13

Pick. Rep. 173; 20 ib. 280; Hammond v. Anderson, 1 B. & P. Rep. 68; Zwinger v. Sumada, 7. Taunt. Rep. 265.]

The defendant's purchase was made in reference to the weights of the 66 bales previously ascertained, as evidenced by the remark of the warehouseman addressed him at that time; for that was such as to have induced him to insist upon a reweighing had he desired it. If the broker of the defendant did not consider the sale complete, and the property changed, why did he send for the samples? They could have been of no value to him, but were necessary to enable the plaintiff to discharge his commission.

It is possible that by considering each charge given, or refusal, as entirely isolated from all others, error may be found in the bill of exceptions, but such is not the correct mode of treating it. The bill of exceptions must be considered as a whole, and each part of it be allowed to explain and sustain the other, if by any reasonable interpretation it may be done.

They also cited their argument and the opinion of the Court in Magee v. Billingsley, 3 Ala. Rep. 579.

COLLIER, C. J.—The recital of the evidence in the bill of exceptions would seem to indicate that the contract for ninety bales of cotton was entire, and that none of them were put at the purchaser's risk until all were weighed. The charge given in answer to the third prayer of the defendant's counsel for instructions, which asserted that only as to the cotton not weighed, did the seller's risk continue—and the refusal to give the two following charges prayed, clearly show the opinion of the Judge to have been, that the cotton which was weighed might be at the purchaser's risk, although the remainder might not be in a deliverable state.

The entirety of the contract is a question of law, while the terms in which it was entered into are referable to the jury and must be ascertained by them. Instead then, of undertaking to inform the jury that the contract was divisible, the Court should have instructed them, that if the agreement was to purchase ninety bales of cotton in a warehouse in Mobile, at the prices stated by the witness, all of which were not in a condition to be delivered, because all was not weighed, the contract was entire for the purchase of all the cotton, though

there may have been a difference in the price, according to classification, and the bales had several distinct marks on them, indicating the name, &c. of the planter who prepared them for market.

In determining the character of the contract, we cannot, as argued by the defendant in error, be influenced by the extent of the orders which the broker had from his customers for cotton on the day he made the purchase in question. The seller had no connection with these orders, and does not appear from the record to have been aware of them. But even if the purchaser had fully informed the seller on this point, it could not change the legal effect of the contract; this must be ascertained from the situation of the parties, the subject matter and the terms employed by them as furnishing the surest *indicia* of their intention.

The sending the delivery order by the defendant in error to the plaintiff's broker was a gratuitous act, and done as it seems at his own suggestion. The *quo animo* with which it was sent and received does not appear; and it cannot be inferred that either party intended thereby to perfect the sale, inasmuch as the situation of the cotton remained as it was when the contract was made. Perhaps the reasonable inference is, the delivery order was sent merely to enable the purchaser to examine the cotton, and after it should be weighed to invest him with the right of property.

In *Magee v. Billingsly*, [3 Ala Rep. 698,] we say, "the order to the warehouseman to deliver all the cotton of the plaintiff in store, is not conclusive evidence to show a transfer of right; but the *prima facie* inference, from an inspection of the paper taken in connection with the contract, is that the seller intended to part with the possession, as well as the property, in favor of the purchaser." In that case it appeared that the order was received and presented at the warehouse, and that the contract was for the "purchase of an entire crop of cotton then present, without reference to quantity, at a certain price *per pound*, all of which had been weighed by a public weigher, within seven days preceding." No stipulation was made for a credit, but the money was to be paid when called for. There the cotton was in a deliverable state, and the purchaser authorized to take the actual possession at pleasure; while in the present

case the purchaser was informed that the cotton was not all weighed, and it could not be delivered in less than two days. There is a most obvious difference in the cases, even upon the hypothesis that the order was accepted by the broker of the plaintiff in error, to enable him to take the possession of the cotton; for in the one case it would become operative immediately upon its delivery, and in the other not until the cotton had been weighed.

The first charge supposes, that although the delivery order was sent to the broker on the day the contract was made, it did not vary the contract, and that it was still to be executed two days thereafter. The seventh charge is inconsistent with the first, and assumes that the jury in their discretion may infer an agreement to receive the cotton, according to the terms of the order, inasmuch as it was not promptly returned by the broker. This inference we have seen is not authorized, and the latter instruction was calculated to induce a verdict not in harmony with the law.

We infer from the bill of exceptions that it was shown to the Court, that Graham, the weigher and warehouseman was dead, that the book, the extract from which was offered as evidence, was the one in which he made the entry of the weights of so much of the cotton as was weighed, and that the book itself was destroyed. These preliminary facts being established, the evidence was clearly admissible. The principle is now too firmly settled to require argument or illustration, that books of accounts kept by a deceased clerk, and all other entries or memoranda made in the course of business or duty, by any one who would at the time have been a competent witness to the fact which he registers, are admissible evidence. [2 Phil. Ev. C. & H. ed. 675, *et post.*] Where the book or memoranda containing the original entry is lost, then the rule which declares that the next best evidence attainable shall be received, makes the transcript from the book, supported as it was by the oath of the witness who transcribed it clearly admissible.

It appears from the view taken, that the Circuit Court erred in several particulars, which we need not recapitulate. The very extended consideration given to the law of sale in *Magee v. Billingley*, makes it unnecessary for us to add more in this case than to declare the judgment is reversed and the cause remanded.

CRAWFORD ET ALS V. THE PLANTERS' AND MERCHANTS' BANK.

1. Where a notice was given by a Bank that a motion would be made for judgment against four persons, and a judgment was taken against two only, and this judgment set aside and the cause continued and at the next term a judgment was taken against all four, without any other notice, the judgment against all was erroneous, because there was no evidence that a motion was submitted at the first term against the two who were not noticed in the first judgment.

ERROR to the Circuit Court of Mobile.

This was a proceeding by motion in the Court below, by the Bank against William Crawford, P. T. Harris, H. G. Davis and Thomas L. Starke, on a note payable to the Bank. At the May term, 1841, the following entry was made:

Planters' and Merchants' Bank v. W. Crawford and P. T. Harris.—Motion to set aside judgment at this term and to continue the cause. Motion granted and cause continued.

At the succeeding term judgment was rendered as follows:

The Planters' and Merchants' Bank of Mobile v. William Crawford, Ptolemy T. Harris, Henry G. Davis, Thomas L. Starke.—This day came the Planters' and Merchants' Bank, by its attorney, and moved the Court now here for judgment against William Crawford, Ptolemy T. Harris, Henry G. Davis and Thomas L. Starke, as makers of a certain promissory note, &c. &c. It is therefore considered, &c. &c.

Among other assignments of error are, "that the cause was discontinued as to the defendants, Davis and Starke."

CRAWFORD, for plaintiffs in error.

GIBBONS, contra.

ORMOND, J.—In the case of *Broughton v. The State Bank* [6 Porter, 48,] it was held that if no action is had upon a notice that a motion will be made for a judgment at the term to which the notice refers it had spent its force and cannot be af-

terwards acted on; and that to authorize a judgment on the notice at a succeeding term, it must be submitted to the Court at the term indicated in the notice and the motion continued. The same point was again thus ruled in *Armstrong v. Robertson and Barnwell*, [2 Ala. Rep. 164.]

It appears from the record that at the May term of the Court, 1841, a judgment was set aside and the cause continued.

The judgment which was set aside is not set out in the record and the only description is the motion to set it aside, where it is described as a judgment of the Planters' and Merchants' Bank against W. Crawford and P. T. Harris. From this it is a just inference that no judgment had been obtained at that term against the other two parties to the note and that no motion had been made on the notice as to them. The continuance of the cause will doubtless operate as a continuance of the motion as to those against whom the judgment was rendered, but cannot have that effect as to those against whom it does not appear that any judgment was rendered, or any motion made for judgment, as indicated by the notice.

The judgment was by default, and it should appear affirmatively in the record, that all against whom the judgment was rendered had notice of the intended motion. It is true, it is stated in the judgment of the Court that thirty days notice of the motion was proved to have been given to all the parties, but this must be held to refer to the motion intended to be made, and which appears to have been made against some of the parties at the preceding term. If the first judgment had been abandoned and a new notice given for judgment at the term at which a judgment was rendered against all the parties, there would be no propriety in connecting it with the first judgment. We can attain no other conclusion than that the notice referred to in the judgment of the Court, was the notice on which the first judgment was founded.

As, therefore, it does not appear that any notice was given to two of the parties to the judgment, the entire judgment is erroneous and must be reversed. But as it was entirely competent for the party to ask for judgment against any of those who had notice, the cause will be remanded that the plaintiff may proceed in any manner he thinks proper.

QUINN ET AL V. ADAIR.

1. When a summary judgment is authorized upon a bond, the same construction is to be given to the bond as would be if the recovery was sought by suit.
2. The statute requiring the appellant from the judgment of a Justice of the Peace to give bond, applies as well to the plaintiff as to the defendant.
3. An appeal bond given by the plaintiff, conditioned to sustain and prosecute the appeal will not sustain a judgment against the securities to it, the words *to pay and satisfy the condemnation of the Court*, being required by the statute and omitted from the condition.

WRIT of Error to the Circuit Court of Coosa County.

The questions made by the assignments of error grow out of the rendition of a judgment against the securities of Quinn on appeal bond. The action was commenced before a Justice in the name of E. W. Quinn, for the use of Abner Quinn, against Adair. The Justice seems to have rendered judgment in favor of Adair, the defendant, for eighteen dollars and thirty-seven cents, but it does not appear whether it was given against the real or the nominal plaintiff, except that the recitals of the appeal bond, afterwards given by E. W. Quinn, state the judgment as having been rendered against him, but this recital varies from the statement of the Justice in giving the sum of the judgment as \$38 62. An appeal was granted to the Circuit Court, and E. W. Quinn executed a bond, with Wm. Z. Terry, W. K. Greenwood and George Gray as his sureties.

This bond, after reciting the appeal of Quinn from a judgment in favor of Adair, for \$38 62, is conditioned to appear at the next Circuit Court, and then and there to prosecute and sustain his appeal.

The case was tried on the appeal, and judgment rendered in favor of Adair for costs of suit. At the succeeding term, Adair produced the appeal bond sent up by the Justice, and moved the Court to enter judgment *nunc pro tunc* against the securities as well as against Quinn. The Court granted the motion by rendering the judgment, but signed a bill of excep-

tions at the instance of the plaintiff and his sureties. The writ of error is prosecuted to reverse this judgment.

CHILTON, for the plaintiff in error, insisted that it was error to call the securities into Court after the final disposition of the suit against their principal, but however this might be, no judgment ought to have been rendered, because the condition of the bond is not such as is required by the statute, [Digest, 260, §9,] and therefore no summary judgment could be given. It may also be questioned whether the act contemplates a bond to be given by a plaintiff when he is the appellant.

MORRIS, *contra*.

GOLDTHWAITE, J.—1. It is contended by the plaintiff in error, that the condition of the bond is to receive the same construction, whether the remedy on it is by suit or by a summary judgment. In this we entirely concur, and our opinion is, that if the bond is so defective as not to warrant the judgment, it is immaterial whether the remedy is sought by suit or motion.

2. It is also insisted that the act authorizing appeals from the judgment of a Justice, and providing that the appellant shall give bond and security, does not contemplate the case of an appeal by the plaintiff.

The statute is in these words—any person aggrieved by the judgment of any Justice, may, within five days thereafter, appeal to the next superior Court, sitting for his county, first giving to such Justice bond with good security in double the amount of such judgment, conditioned to prosecute such appeal to effect; and in case he be cast therein to pay and satisfy the condemnation of the Court. [Dig. 260, §9.]

This enactment is sufficiently broad to cover the case of a plaintiff, and the only reason of any force against the practice grows out of the fact that the judgment in most cases against the plaintiff is only for the costs, which are necessarily small in amount, and therefore the bond in its penalty will not in ordinary cases be sufficient to cover the costs in the Circuit Court. We are not called on to determine the amount of security afforded by such a bond, and in our opinion it is as obligatory

on the plaintiff as it is on the defendant to give bond and security in case of appeal.

3. The judgment is next opposed for the reason that all the condition has been fulfilled by the prosecution of the appeal to effect; and as it does not contain the further condition to pay and satisfy the condemnation of the Court, the judgment cannot be sustained.

We think this objection is well taken. It is impossible to say that the condition of this bond is the same as that required by the statute—its only condition is that the plaintiff shall prosecute and sustain his appeal; this has been done, and he has been so far successful as to rid himself of the principal amount for which judgment was rendered; but independent of this, no judgment ought to have been rendered on the bond, for its want of conformity to the statute, which is the only matter which can warrant a summary judgment on it.

For this error the judgment of the Circuit Court, rendering judgment *nunc pro tunc* against the sureties in the bond is reversed.

STEPHENSON ET AL V. MANSONY.

1. The Court trying a cause may annex as a condition on which a new trial is granted, that the party asking for it, pay costs, or that it be granted, unless the plaintiff remit damages, &c.
2. Upon a motion for a new trial submitted by the defendants, the Court made the following order: "The plaintiff is hereby required to remit the one thousand dollars damages assessed by the jury, or a new trial is granted by the Court, on the payment of all costs." In a short time after the Court had adjourned for the term, the defendants paid the costs. At the second term thereafter, the plaintiff moved to strike the cause from the docket, upon his releasing damages—*Held*, that the costs were paid in due time, but the plaintiff should have elected to enter a *remittitur* at an earlier day, and the cause could not now be dismissed.
3. An order declaring that a previous order had been complied with, and adjudging that the cause to which it relates be stricken off the docket, is not revisable

Stephenson et al v. Mansony.

on writ of error; but if injustice results from it, the appropriate remedy is by writ of *mandamus*.

WRIT of Error to the Circuit Court of Mobile.

This was an action of trespass by the defendant in error against the plaintiffs, to try the title to, and recover the possession of, certain real estate, situate in the county of Mobile, together with damages for its occupancy. The cause was tried at the term of the Court holden in April, 1839, and a verdict returned in favor of the plaintiff, that he recover the possession of the land and one thousand dollars damages. On the first day of June, 1839, during the same term, the defendant moved the Court for a new trial; in answer to which the Court made an order as follows, viz. "In this cause is a motion for a new trial, the plaintiff is hereby required to remit the one thousand dollars damages assessed by the jury, or a new trial is granted by the Court, on the payment of all costs."

At a term holden in April, 1841, the plaintiff released the damages assessed by the jury, at the trial, and thereupon the Court struck the cause from the docket, overruled the motion for a new trial, and awarded a writ of *Habere facias possessionem*. This order was made on the motion of the plaintiff submitted in April, 1840, and then continued.

To the order striking the cause from the docket the defendants excepted. The bill of exceptions shows that the plaintiff had never released the damages, but the defendants had paid the costs of the suit in July, 1839, and that the Court put the plaintiff to his election either to release the damages or go to trial. Other matters are stated in the bill of exceptions, but are already recited from the record and need not be here repeated.

CAMPBELL, for the plaintiffs in error.

STEWART, for the defendant.

COLLIER, C. J.—It is a right incidental to all Courts invested with the jurisdiction to hear and determine causes, to grant new trials so as to promote justice.

This power, though guided by certain rules which have been laid down from time to time, must, of necessity, be to a great extent discretionary. An order for this purpose may be either absolute or unqualified, or may be conditional and impose upon the party asking it the performance of some act, or to prevent a new trial it may require the party against whom the motion is made to renounce at his election, some advantage he has gained. This being the case it will follow that the order first made by the Circuit Court was entirely regular.

The inquiry is, what does this order require of the respective parties, and what are the legal consequences that result from it? To prevent a new trial the plaintiff is explicitly required to release "the one thousand dollars damages assessed by the jury." True, no time is prescribed within which the release is to be perfected, yet it would seem that it should be made pending the term of the Court; otherwise, upon the payment of the costs by the defendants, the cause might remain in Court for an indefinite period, and upon being called for trial after repeated continuances, at the election of the plaintiff to release damages, be stricken from the docket. But if the failure of the plaintiff to release the damages at the term when the order was made, cannot be regarded as an assent that the case shall be retried, certainly its reinstatement and continuance without objection at the succeeding term must have that effect. The record does not explicitly inform us that the cause was continued at the fall term of 1839; yet the payment of the costs in July placed it in Court again, and it was continued by operation of law, up to April, 1840, when the motion was first submitted by the plaintiff to strike it from the docket.

Perhaps it may be supposed that the defendants should first have paid the costs, before the plaintiff could be required to release. The nature of the order forbids such an idea. True, the defendants would have been liable to an execution for the costs, if the damages had been released, but the order only contemplated that they should be paid into court to obtain a new trial. It was uncertain whether the defendants could have the case re-tried until after the time had elapsed when the plaintiff might elect to release; and having paid the costs in a reasonable time thereafter, it seems to us that they have done

every thing enjoined upon them, to obtain the benefit of their motion.

From this view it results that the cause was improperly stricken from the docket of the Circuit Court, and if the writ of error authorizes the revision of the order for that purpose, it must be reversed. But it has occurred to us to be worthy of inquiry, whether, in a case like the present, a writ of error will lie.

A writ of error is in the nature of a commission to the Judges of the Court to which it is returnable, to examine the record upon which the judgment or decree was given; and lay at common law where a party supposed himself aggrieved by any error in the foundation, proceeding or judgment of a suit in a court of record. By statute a writ of error is given for the removal of a final judgment at law, or decree in Chancery, or a final order of the Orphans' Court, &c. The order in question technically speaking cannot be regarded as the judgment of the Court in the cause. It neither adjudges that the plaintiff has made out his case, or that the defendants have not sustained their defence. It merely determines that the plaintiff had complied with the previous order of the Court, and as a consequence, the judgment which had been rendered should not be set aside. In other words, it only gave effect to an order which directed a new trial should be granted, if a plaintiff failed to do a certain act, by declaring that, that act had been regularly performed. It is only a continuation of the first order and according to the view we have taken, cannot be revised on error.

The defendants are not, however, remediless. It is entirely competent for them to ask this Court to compel a reinstatement of the cause by *mandamus*. This is a writ, introduced it is said, to prevent a failure of justice, and ought to be used on all occasions where the law has established no specific remedy, and where in justice there ought to be one. [5 Com. Dig. 31, *et post*; *Ex parte* Bradsheet, 6 Peters' Rep. 774; *Ex parte* Hoyt, 13 id. 279; *Livingston v. Dorgenois*, 7 Cranch's Rep. 477; *Welsh v. Mandeville*, 7 Cranch's Rep. 152; *Ex parte* Tarlton, 2 Ala. Rep. N. S. 35; *The People v. The Mayor*, &c. 10 Wend. Rep. 293; *The People v. The Superior Court of the city of*

New York, 5 id. 144; Anon. 9 id. 472; Ex parte Nelson, 1 Cow. Rep. 417.] Without a particular review of the cases cited, it may be sufficient to say that some of them are pertinent to show that a *mandamus* is the appropriate remedy for the defendants.

The consequence is that the writ of error is dismissed.

FOURNIER v. CURRY.

1. An execution issued on a judgment which the sheriff has discharged by paying the amount to the plaintiff in execution is not void but may be set aside by the defendant in execution as having irregularly issued. If he omits or declines to do so, no one else can take advantage of it.

ERROR to the Circuit Court of Marengo.

Detinue for a slave by the defendant in error against the plaintiff in error.

From a bill of exceptions taken pending the trial, it appeared that the defendant was the agent of one James S. Duval of Pennsylvania—that the slave sued for was purchased on the 17th February, 1834, by William B. Duval, son of James S. Duval, that the bill of sale was taken in the name of James S. and the purchase money paid by him, and that after the purchase the negro was placed on the plantation of James S. in Marengo county, where William B. resided.

It was also proved that on the 29th June, 1833, James S. Duval by his agent, by deed of that date leased to William B. Duval his plantation and slaves in Marengo county, for one year, renewable from year to year at the pleasure of the lessor, for the consideration of natural love and affection, and for the further consideration of two dollars, payable at the expiration of each year, which was recorded.

Several witnesses were examined who lived in the neighborhood of the plantation of James S. Duval, where William B. Duval resided, and proved that the latter used and controlled the property as his own, and acquired credit from the fact of having it in his possession, and that they never heard of the claim of the father to the property.

The slave sued for in this action was seized on the 11th April, 1836, by the sheriff, by virtue of an execution against Wm. B. Duval, and sold on the 2d May after, and purchased by the plaintiff, who had been the previous sheriff of Marengo county. There was proof tending to show that the plaintiff while sheriff had paid off the executions levied on the slave and afterwards had them issued and levied for his benefit.

The Court charged the jury that if they believed, from the evidence, that the claim of James S. Duval was an honest and fair one, and not intended to cloak or protect the property of William B. Duval from the payment of his debts, his title to the negro was good. But if the claim was founded in fraud, or James S. Duval had so acted in regard to the property as designedly to enable William B. Duval to commit a fraud upon his creditors, then the negro would be liable for the debts of the latter: and further, that although they might believe from the evidence, that the plaintiff, while sheriff, had paid off the sum due on the execution, yet that fact would not invalidate a purchase made by him under the alias executions.

The defendant by his counsel moved the Court to instruct the jury, that if they believed from the evidence that the purchase of the negro by James S. Duval, was fair and honest and that he paid the purchase money, he had the right to leave the slave in the possession of William B. Duval, for any period not exceeding three years without divesting his title by such possession. The Court admitted such to be the law, and so said to the jury; but the plaintiff not having contended that a three year's possession had operated on any title of James S. Duval, and the proof being contrary, the Judge remarked he would not say to the jury, that the principle applied to the case.

To the charges given, and the refusal to charge, the defendant excepted, and a judgment was rendered for the plaintiff, from which this writ is prosecuted.

The assignments of error question the propriety of the charges given and refused.

LYON and JONES, for the plaintiff in error, insisted that the plaintiff having, while sheriff, paid off the executions in his hands, discharged the judgment, and that a purchase by him under the alias execution was void. [6 Porter, 432; 7 J. Rep. 426; 3 id. 434; 15 id. 443; 14 id. 87; 7 Cowen, 13; 4 Wendell, 485.]

That the charge asked for should have been given, and that the qualification annexed to it by the Court was, in substance, a refusal.

J. B. CLARK and MANNING, contra, contended that the motion for the charge, that if the plaintiff, while sheriff, paid off the execution, it could not be afterwards reissued, was not warranted by the testimony, and being abstract was properly rejected. [1 Ala. Rep. 584.] That admitting the sheriff paid off the first execution, that would not render the second void, but voidable merely, and that no one but the defendant in execution could take advantage of it.]

That the refusal of the Court to charge the jury in regard to the right to loan the property for three years without recording it, could not prejudice the defendant, because the case was put to the jury on the ground of fraud, and the property had not been three years in possession of the defendant in execution. In support of these views they cited 1 Porter, 144; 2 S. and P. 111; 6 Porter, 445; 9 id. 405; 1 Ala. Rep. 584.]

ORMOND, J.—In the case of Boren v. McGee, [6 Porter, 432,] we expressed the opinion, that the sheriff had no power to pay a judgment and keep the execution open for his own benefit. That the defendant in execution could not deal on equal terms with him, armed as he is with the coercive power of the law, and that therefore such a traffic was forbidden by public policy, and that such payment, so far as it related to the defendant in execution, was a discharge of the judgment, who had the undoubted right to arrest the process and stop its execution. The point was distinctly presented on the record and necessary and proper to be decided, and having again consid-

ered it, we are satisfied of its correctness, being supported by reason and well sustained by authority.

In that case the judgment was paid by the sheriff, the execution reissued and levied on the land of the defendant in execution, which was sold without objection by him. When the purchaser brought his action of ejectment, to recover the land, we held that the execution was voidable merely, and that the purchaser acquired a good title.

The principle to be extracted from that case is that an execution issued on a judgment thus discharged by the act of the sheriff is not absolutely void, but may be avoided by the defendant in execution; and that if he omits to do so, the purchaser acquires a good title under it. It is true that some stress is laid, in that case, on the fact that the purchaser was ignorant of the discharge of the judgment, but that was not a necessary element of the decision, which turned entirely on the question, whether the process was void or voidable.

In this case the objection is not made by the defendant in execution, but by a third person, and if it were conceded that the defendant in execution, without setting aside the process for irregularity, or the sale made under it, could raise this objection in an action by the purchaser, with notice that the judgment had been previously satisfied, it would by no means follow that such objection could be made by a stranger. For although the law forbids such dealings between the executive officer of the law and the defendant, in execution from the tendency of such acts to extortion and oppression, yet such an advance of money by the sheriff may not only be fair and honest, but may have been induced by the entreaties and promises of the defendant himself, and exclusively for his benefit. He may therefore not desire to avail himself of a privilege conferred on him by law for his protection, and if he does not interpose no one else can.

In *Woodcock v. Bennet*, [1 Cowen, 737,] it is said that the definition of voidable process is, that it stands good until reversed, and can only be reversed by a party to the suit.

In *Jackson v. Bartlett*, [8 Johns. 361,] where an execution had issued a year and a day after the judgment without revival by *sci. fa.* it was held to be voidable at the instance of the party only against whom it issued. The Court therefore did

not err in its instruction to the jury, that the purchase of the defendant in error, under the *alias* execution was not void.

The defendant also moved the Court to charge that a slave might be loaned in good faith for any period less than three years, without impairing the title of the owner, and without a registry of such loan. The Court admitted such to be the law, but informed the jury that the principle did not apply to the case, because three years had not elapsed since the loan was made.

It has been frequently held in this Court, that it is error for the Court to refuse a charge correctly asked, although it may afterwards give the same charge in substance, on the ground of its tendency to mislead the jury.

I incline to the opinion that the charge in this case comes within the influence of those decisions. Evidence had been introduced to show that the defendant in execution was supposed by his neighbors to be the owner of the slave in controversy, from having the possession, and acquired credit thereby. It was therefore vitally important to the defendant to satisfy the jury that he was in no legal default, and that the false credit which it seems the younger Duval obtained from the apparent ownership, was owing to the credulity of those who relied on delusive appearances. The injury to the defendant by the charge as given, was probably as great as if it had been refused. Nor can I understand with what propriety it could be said that the law referred to did not apply to the case, when it was by virtue of that alone that the possession of the younger Duval was consistent with title in the father.

But my brothers think the Court was justified in limiting the charge in the manner it did, and placing the question on the ground of fraud. From this it follows that there is no error in the judgment, and it is therefore affirmed.

Scull v. Godbolt.

SCULL v. GODBOLT.

1. When an execution on a judgment has been sued out within a year and a day after its rendition, and returned *nulla bona*, it is not irregular to issue another execution after a lapse of eight years.

APPEAL from a judgment of the Circuit Court of Mobile, quashing an execution.

CAMPBELL, for the appellant, cited 1 Strange, 100; Hardin's Rep. 521.

GAYLE, contra.

GOLDTHWAITE, J.—It appears from the statement in the judgment entry that the appellant recovered judgment against the appellee, at the November term for the year 1833. On the 24th June, 1834, she sued out an execution which was returned *nulla bona*. An alias was sued out the 4th January, 1842, without *scire facias*, and quashed for that omission.

A statute connected with this subject was passed in 1835, [Digest, 621,] and under its influence it is probable this execution was quashed. Its fourth section recites, that doubts had arisen whether a *scire facias* will lie on a judgment when execution has not issued within the year and day, for remedy whereof it was enacted, that on all judgments of record, when execution has not been issued within a year and a day, it shall be lawful for the plaintiff in any such judgment to have *scire facias* against the defendant, commanding him to appear at a regular term of the Court in which such judgment is of record, and show cause, if any he or she have, why the plaintiff shall not have execution of his or her judgment.

A previous section of the same act declares that when an execution has once issued, within a year and a day, and is returned without being fully satisfied, it shall be lawful for the plaintiff at any time thereafter, to issue another execution with-

out suing out a *scire facias*, or other process to revive it. The act also declares that no judgment shall be presumed to be satisfied when execution has issued within a year and a day, without payment or satisfaction entered of record, unless no other execution shall have been issued for the space of ten years.

It is not important to consider whether this statute is retrospective or otherwise, because if it has a retroactive effect, this case is clearly within its terms, and if it is not, it is certain that according to the course of practice, the execution was regularly issued.

When the plaintiff does not sue out an execution within a year and a day, he cannot afterwards do so without *scire facias*; and the reason is, that his delay induces a presumption that some good cause exists why he should not proceed; but no such presumption arises when within that time he has sued out his execution and it has proved ineffectual from any cause whatever, but the more especially when it is returned *nulla bona*.

Here all presumption of payment is rebutted, and the true reason for delay may be the ascertained inability of the defendant to satisfy the debt.

The practice in the Court of King's Bench is, for the plaintiff to continue his execution on the roll; but these continuances are entirely formal, and may be entered after the issuance of the second execution. [Tidd's Practice; 1 Strange, 100; Craig v. Johnson, Hardin, 520.]

The judgment of the Circuit Court quashing the execution must be reversed.

TRAWICK v. DAVIS.

1. If the proceedings before the Justice of the Peace in a case of bastardy, are defective, the defendant should move the County Court to quash them before he appears, and impliedly admits himself to be regularly in Court.
2. The bond given for the appearance of one charged with being the father of a bastard child should be made payable to the Governor.
3. *Semble*—the bond entered into to answer to a charge of bastardy, is binding upon the obligors until the case is disposed of, though it may be continued for several terms. Be this as it may, the continuance of the case on the defendant's affidavit will keep it in Court as to him.
4. The act of 1811 as modified by the act of 1816, only requires an issue and trial by jury to ascertain the paternity of a bastard child, where the reputed father demands it.
5. The appearance of the reputed father is not indispensable to authorize the Court to determine the question of filiation.
6. Under our statutes it need not appear of record, that it was shown to the County Court that the bastard child was still living.
7. Notwithstanding the remedy provided by statute, a direction in the judgment against the father of a bastard child, that an execution issue thereon for each default in the payment of the sums adjudged to be paid, is regular. [COLLIER, C. J. *dissenting on this point.*]
8. The mother of a bastard child should not be made a party to a writ of error prosecuted by the father, but the Judge of the County Court, who is considered as the legal plaintiff in the judgment, should be made the defendant.

WRIT of Error to the County Court of Tuscaloosa.

This was a proceeding in bastardy, commenced under the statute, by the defendant in error against the plaintiff, in which she charges him with being the father of a bastard child, of which she had been delivered more than three years previously. The defendant below entered into a bond with sureties, in the penalty of one thousand dollars for his appearance at the next term of the County Court, and to "abide and perform such order or orders as shall be made in the premises, pursuant to the act in such cases made and provided," &c. The condition of the bond recites that Sarah Davis is a single woman, and that her examination, taken in writing before the Justice of the Peace who issued the warrant, established the charge against the accused.

At the term of the Circuit Court to which the proceedings were returned, the case was continued on the affidavit of the accused. At the next term an entry was made disposing of the case, as follows: "Came the said Sarah Davis, by her attorney, and the said defendant, the said Hugh Trawick, being called to answer the complaint made herein, came not, and it appearing to the satisfaction of the Court, by the examination of the said Sarah Davis, that the said complaint is true, and that the said defendant is the real father of said bastard child. It is therefore considered by the Court, that the said defendant be condemned to pay the sum of fifty dollars yearly, for the period of ten years, towards the maintenance and education of said bastard child, and that execution issue to collect the said several payments, and that the said defendant pay the costs of this prosecution," &c. The record does not discover that any further order was made in the premises.

HUNTINGTON, for the plaintiff in error, contended, that the Justice of the Peace before whom the preliminary proceedings were had, having failed to examine the woman in the presence of the alledged father, and the affidavit before the Justice not having averred that the child was then in existence, the County Court erred in taking jurisdiction of the case; that the statute requiring an issue to be made up and submitted to a jury, the Court had no right to try and determine the question of paternity, and that although the plaintiff in error was not present, yet that something in the nature of a writ of inquiry was necessary; that the Court erred in resting upon the isolated testimony of the defendant in error—the credibility of such evidence being peculiarly liable to suspicion, and more than three years having elapsed since the alledged birth without any proof that the witness had made the charge during the pains of travail, or adhered to it up to the time of the trial; that the failure to recognize the plaintiff in error to appear at a subsequent term operated as a discontinuance; that the Court erred in rendering its judgment, no issue having been found against the plaintiff in error, and also in ordering execution upon the judgment without an intervening bond; moreover, that the judgment entry was defective in omitting to state that the then present existence of the child was proved to the satisfaction of the

Trawick v. Davis.

Court, or any proof as to age, sex, place of birth or residence of the child, whereby the same could, by the said judgment, be in any manner proved or identified.

In support of which the counsel for the plaintiff in error cited Aik. Dig. Tit. Bastardy, 76, 77; Isaacs v. Judge, &c. 5 Stew. & Por. 402; Foster v. Beaty, 1 Greenl. 304.

PECK & CLARK, for the defendant, insisted that most of the errors assigned were rather ideal than real, that this Court will not look into the proceedings before the Justice of the Peace, or inquire whether they were in conformity to law. That the continuance of the case at the first term of the County Court prevented a discontinuance, although a new recognizance was not then entered into. The judgment authorizes the person entitled to receive the money, to have execution upon default in the payment of any instalment; and as to the appointment of a guardian, that is not properly a part of the judgment, and cannot in any manner affect it. They cited *Mariner v. Dyer*, 2 Greenl. Rep. 165.

COLLIER, C. J.—1. The objection to the proceedings before the Justice of the Peace issuing the warrant and taking the bond of the defendant are not now open to examination. If defective to such an extent as to make them voidable, a motion to quash should have been submitted to the County Court at the proper time; and it is not permissible, after the accused has appeared and impliedly admitted himself to be regularly in Court, by asking and obtaining a continuance, to insist that the warrant under which he was arrested is invalid. [*Walker v. Commonwealth*, 3 Mar. Rep. 356; *Schooler v. Commonwealth*, 6 Lit. Rep. 89.]

2. The statute does not expressly direct to whom the bond taken for the defendant's appearance shall be made payable; yet as the charge partakes of the character both of a civil and criminal proceeding, we think by analogy to the law providing for bonds and recognizances which concern the public, the bond was properly made payable to the Governor. Such has been the decision in South Carolina on this point. [*Commissioners, &c. v. Gaines*, 1 Const. Rep. 459; See *Lake & Barron v. The Governor*, 2 Stewart's Rep. 395.]

3. The failure of the County Court to cause the defendant to renew his bond, did not operate a discontinuance of the case. The object of the bond was intended to coerce his appearance, and if he made default he would become liable to pay the penalty or comply with the order of the County Court. It was essential to the initiation of the proceedings; but the case being commenced and the defendant appearing, if a trial could not be had at the first term, the want of a new bond would not put an end to it. The condition of the bond entered into goes beyond the terms prescribed by the statute; it requires the accused "to abide and perform such order or orders as shall be made in the premises," &c. Whether this extension imposes a duty which the act does not, we will not inquire; but if such is the legal effect of the statutory condition, then it is clear that no additional bond was necessary to enable the Court to enforce its orders. [Taylor v. Hughes, 3 Greenl. Rep. 433.]

Again—we are inclined to think the bond taken in a case of bastardy, assimilates itself, in its legal effect quite as much to a bail bond in a civil case as to a recognizance in a State case; and that it continues in force until the case is disposed of, or the sureties are discharged by an order for that purpose. It follows from what we have said, that the continuance of the case on the defendant's affidavit, as to himself at least, kept it in Court, even if a bond was necessary to bind his sureties.

4. Under the act of 1811, an issue and trial by jury were indispensable in order to ascertain the paternity of a bastard child, but that statute has been so far modified by the act of 1816, as only to make it necessary to submit the case to a jury where the reputed father demands it. Such was the decision of this Court in Lake & Barron v. The Governor, [2 Stew. Rep. 395,] and we are unwilling to depart from it.

5. Having ascertained the proceeding not to be strictly of a criminal character, we think the appearance of the defendant was not indispensable to authorize the County Court to determine the question of filiation. He could not at pleasure arrest the course of the Court, and leave no other alternative than to sue his bond; but the mother, with the assent of Court might, perhaps, have elected to sue the bond instead of submitting the case to the Court for its judgment.

6. In respect to the objection that it does not appear of re-

Trawick v. Davis.

cord the child was born alive and still lives, although the proceedings would appear more technical if they contained such a statement, yet its omission is not fatal. Proceedings in a case of this kind should not be scanned with too much strictness, but it should be rather intended, where the reverse is not shown, that every thing material was proved in the County Court. Our statutes require no declaration to be made in that Court of the facts which are necessary to make out the guilt of the defendant as do the laws of Maine and several other States; consequently the decisions which have been cited from that State on this point are entirely inapplicable. There is an additional reason why it need not appear of record that the child is living; it is this, our statute provides "that if said child should never be born alive, or being born, should die at any time, and that fact suggested upon the record of the County Court, then, and from that time, the bond aforesaid shall be void." Here a very simple mode is provided, by which the reputed father may avoid a charge upon him by making known to the Court that the object of it has ceased to exist.

7. The statute does not contemplate an award of execution such as has been made in this case. It merely directs that the reputed father shall be condemned by the judgment to pay not exceeding fifty dollars annually, at the discretion of the Court, towards the maintenance and education of the child; and then it provides that the father shall execute a bond with surety for the payment of that sum, which shall be made payable to the Court and appropriated under its special order from time to time, so that it be not paid to the mother. This bond is to have the force and effect of a judgment, and execution may issue thereon as the sums secured by it become due. The award of execution on the judgment of the County Court was in my opinion unauthorized by the statute; the only regular mode of enforcing obedience to such a judgment is by an attachment to compel the defendant to execute a bond with surety to pay annually the sum adjudged to be proper for the maintenance of the child. The consequence, if my opinion were to prevail, would be to show that the award of execution is reversible, while the judgment itself would remain in full force. [Johnson v. Harvey, 4 Mass. Rep. 483.] My brothers, however, do not agree with me on this point, but

think that although an attachment was regular, it was competent for the Court to have ordered an execution also. We all however, concur in opinion that the writ of error is irregular in making the mother of the bastard child a defendant. The bond consequent upon the judgment is required to be payable to the County Court; and this, in the absence of more explicit legislation on the point, may serve to show that the judgment should be considered to be in favor of the Judge of that Court, as the representative of the county. But if the law were otherwise, it is certain that the mother is not a party to the judgment, for the statute in express terms declares that the money shall not be paid to her. She was then improperly made a party, and for that cause the writ of error is dismissed.

PAYNE v. THE MAYOR AND ALDERMEN OF MOBILE.

1. A debt to fall due in future for services to be afterwards rendered may be transferred by assignment before the services are rendered, and such transfer, if *bona fide*, will defeat an attachment subsequently sued out against the transferer.
2. When the answer of a garnishee discloses that another person has, or claims, an interest in the debt, such third person should be cited to appear.

ERROR to the County Court of Mobile.

The plaintiff in error having obtained a judgment against one Thomas R. Bolling, upon which an execution was returned "no property found," made the necessary affidavit and sued out process of garnishment against the defendant in error as a debtor of Bolling.

The answer of the corporation was made by the Mayor, who states, that previous to the service of the garnishment he, as Mayor, accepted an order drawn on the corporation by Bolling, in favor of one Gwathmey, for five hundred dollars, that sum being the amount fixed upon as his compensation as one of the

Payne v. The Mayor and Aldermen of Mobile.

assessors of the city for the year 1841, which order has been discharged by the corporation since the service of the garnishment.

The Court rendered judgment in favor of the garnishee. From this judgment the plaintiff prosecutes this writ, and assigns for error—

1. That the debt was not due when the order was accepted by the Mayor.

2. That by the charter the Mayor had no right to accept orders on behalf of the city.

LESESNE, for plaintiff in error.

STEWART, contra.

ORMOND, J.—Neither of the objections taken to this judgment can avail. If no debt existed at the time this garnishment was sued out, the interest of which could be transferred by Bolling to another, the objection would be equally fatal to the garnishment, which will not lie upon a possibility or contingency, but only upon a debt then due, or to fall due. [Planters' and Merchants' Bank v. Andrews, 8 Porter, 404.] The contract of the corporation with Bolling, was to pay him five hundred dollars for his assessment of the taxable property of a portion of the city, and although performance of the service was a condition precedent to his right to the money, we cannot perceive how this can affect his right to transfer his interest before the services were rendered.

It is quite unimportant whether the Mayor had the power of binding the corporation, by accepting the order, or not, as it is very clear that his refusal to accept would not have affected the right of Gwathmey to the money, which did not depend on any act of the corporation, and was only necessary to enable him to sue in his own name.

Upon this garnishment the only question was, whether Bolling had any right to this money when the garnishment was sued out, which, as the answer of the corporation disclosed, was claimed by another. he should have been cited under the recent statute of the State, passed in 1840, to contest his right with the plaintiff in attachment.

Let the judgment be affirmed.

LEAVITT v. DAWSON & FRIOU.

1. When the Court improperly refuses to dismiss a claim to try the right to property levied on by an execution, and non-suits the plaintiff for his refusal to proceed further in the cause, this is an error sufficient to reverse the judgment.

WRIT of Error to the Circuit Court of Coosa county.

GOLDTHWAITE, J.—The bond which the claimants in this case gave, preparatory to the assertion of their claim, is made payable to the sheriff, and does not state the description of the property levied on. It is therefore defective, and as the motion was made at the first term, the claim should have been dismissed, unless a sufficient bond was then executed. [Bradford v. Dawson, 2 Ala. Rep. 203.] As the plaintiffs were not protected as intended by the statute, they had the right to refuse to proceed further in the cause, and were improperly non-suited.

It is not important to consider whether the term non-suit is the most proper to designate this mode of action by the Court, because the effect to the plaintiffs is the same as a judgment of *non pross*, which is the technical judgment in all cases where the plaintiff refuses to proceed further with his suit. In this case his refusal to proceed was warranted by the previous error of the Court, and it cannot be presumed that he has submitted or consented to cease his proceedings.

Let the judgment be reversed and remanded, in order that the claim may be dismissed unless a sufficient bond is given.

GIVHAN v. DAILEY'S ADMR'X.

1. If one man contract with another to serve him as an overseer for a year, and dies before the expiration of that time, his estate shall not be liable to respond in damages for a failure to serve for the stipulated period.
2. Where one man agrees to serve another as an overseer for a year, and in consideration that he will do so, the employer undertakes to pay a sum *in numero*, the performance of the entire service is a condition precedent to the right to recover wages; and if the overseer die during the year, his personal representative cannot recover a *pro rata* compensation for the period he served.

WRIT of Error to the Circuit Court of Lowndes.

The defendant in error, as the administratrix of William H. Dailey, deceased, declared against the plaintiff in *assumpsit*—

1. Upon a promissory note for the payment of four hundred and six 94-100 dollars.
2. For services rendered by the intestate as an overseer.
3. For work and labor done, &c.

The cause was tried by a jury, and at the trial, the defendant below excepted to the ruling of the presiding Judge.

From the bill of exceptions it appears, that evidence was adduced to show that the intestate served the defendant during the year 1838, as an overseer on his farm, under a contract to pay six hundred dollars for his services; also "that intestate was going on to serve defendant for the year 1839, upon the same terms that he did in 1838, without more special proof as to the nature of the contract, and served about two months and died, the 12th March, 1839."

Upon this proof, the defendant requested the Court to charge the jury, that if they believed the contract was entire, and that the services were to be performed before the defendant was to pay the wages or salary to the intestate, and that intestate died previous to performance, his administratrix was not entitled to recover; and that a part performance would not authorize a recovery *pro rata*. This charge the Court refused to give, and instructed the jury that the plaintiff could recover upon the proof of the value of the services rendered; to which refusal to

charge and the charge given, the defendant excepted. A verdict was returned in conformity to the charge and judgment thereon rendered.

COOK, for the plaintiff in error. The contract for service by the intestate was during the year 1839; no part of the sum agreed to be paid him was due until the end of the year, and no recovery could be had for a partial performance. Intestate's death did not confer upon his representative a right of action to which he was not entitled. [Chitty on Con. 4 Am. ed. 567, *et post*; 3 Starkie's Ev. 1765, note 1; 12 John. Rep. 165; Salk. Rep. 65; 7 Porter's Rep. 133.]

BOLLING, for the defendant, cited *Green v. Linton et al*, 7 Porter's Rep. 133; *McMillan v. Wallace*, 3. Stew. Rep. 185; *Blair et al v. Asbury*, 4 Porter's Rep. 435; and insisted that the act of God excused the intestate from a performance of his contract and entitled his administratrix to recover a *pro rata* compensation for his services.

COLLIER, C. J.—It is an admitted principle of the common law, that where a party engages absolutely to do an act, the performance is not excused by inevitable accident, or other contingency not provided for by the contract of the parties. The rule is otherwise where the law casts a *duty* on the party; there the performance shall be excused, if rendered impossible by the interposition of Providence. [Chitty on Con. 4 Am. ed. 567, and cases there cited; *Shubrick v. Salmond*, 3 Burr. Rep. 1637; *Parker v. Hodgson*, 3 M. & S. Rep. 267; 4 Dane's Ab. 469; 3 *id.* 601.]

In *Perry v. Hewlett*, [5 Porter's Rep. 308,] the law was admitted to be as we have stated it, yet it was held, that a covenant to return a slave hired, on a certain day was discharged by proof that the slave had died before the day without the fault of the hirer. The Court distinguished between those cases, where although the act of God caused a destruction of the thing, yet its reparation was possible. Thus, if a lessee covenant to repair a house, its destruction by lightning will not excuse a failure to rebuild; but a covenant to redeliver the premises to the landlord in as good a condition as the lessee re-

ceived them, will be relieved against by showing that the prostration of the trees, the only injury complained of, was occasioned by a tempest. [4 Dane's Ab. 375-6-7-8-9, 382-3; see also *Morrow v. Campbell*, 7 Porter's Rep. 41.] And the principle has been repeatedly acknowledged, that if a party is disabled by an act of God, before breach of his contract, he shall be excused from the performance. Thus, if one man lend his horse to another, who promises to return him by a day certain, or on request, if the horse die before the day, or request, without the borrower's fault, the redelivery will be excused. [4 Dane's Ab. 377; *Williams v. Lloyd*, Sir Wm. Jones' Rep. 179; *Hulings v. Craig*, Addis. Rep. 342; 3 Com. Dig. 109; *Newl. on Con.* 112, 116.]

The contract of the intestate required his personal services and could not be performed by a substitute, and from its nature must have been made upon the implied condition that health and life permitted its performance; such at least is the conclusion inferrable from the authorities cited. But although the intestate's death operated a discharge of the contract for service, it by no means follows that his administratrix is entitled to recover a *pro rata* compensation for the time he served. If the undertaking of the intestate was to perform the duties of an overseer on the defendant's plantation for the year 1839, and in consideration thereof receive at the end of the year six hundred dollars, then the liability of the defendant to pay was conditional, dependent upon the performance of the intestate's contract. To entitle the plaintiff to recover it is incumbent on her to show, that every thing had been done on which the right to demand payment depended. *Cutter v. Powell*, [6 T. Rep. 320,] is a leading case to this point. That was an action of assumpsit for work and labor done by the plaintiff's intestate, to which the defendant pleaded the general issue. The facts were these; the intestate hired a second mate upon a ship for a voyage from Jamaica to Liverpool, his employer subscribed and delivered to him a note for the payment of thirty guineas, ten days after the arrival of the vessel at the port of destination, "provided he proceeds, continues and does his duty as second mate in the said ship from hence to Liverpool." The intestate entered upon the service as agreed, and died at sea, while the ship was performing the voyage, having

up to that event discharged his duty faithfully. The Court held that the contract was entire, the defendant's promise depending on a condition precedent to be performed by the intestate, and which he should have performed to have entitled himself to receive any thing. Further, that the plaintiff could not recover on a *quantum meruit*, for whenever there is an express contract, the parties must be guided by it, and one party cannot relinquish, or abide by it, as it may suit his convenience; and hence the non-performance of the intestate's part of the contract, though without his fault, prevented his administratrix from recovering a *pro rata* compensation. To the same effect are the cases of *Appleby v. Dods*, 8 East's Rep. 300; *Smith v. Wilson*, id. 437.

It has been often decided, and may be regarded as a settled principle of law, that where one has undertaken to serve another for a definite time, at certain wages, or where an entire contract has been entered into for the performance of a number of acts, the service or labor is a condition precedent to the right to demand payment; and it is not competent for a party, after having performed his contract in part, causelessly to decline proceeding further in it, and recover upon a *quantum meruit*. *Pettigrew v. Bishop*, 3 Ala. Rep. 440; *Turner v. Robinson*, 6 C. & P. Rep. 15; 5 B. & A. Rep. 789; *Hulle v. Heightman*, 2 East Rep. 145; *Ellis v. Hamlin*, 3 Taunt. Rep. 52; *Jesse v. Roy*, 1 C. M. & R. Rep. 342; *Sinclair v. Bowles*, 9 B. & C. Rep. 92; *Roberts v. Havelock*, 3 B. & Ad. Rep. 404; *Philbrook v. Belknap*, 6 Verm. Rep. 383; *Hair v. Bell*, id. 35; *Stark v. Parker*, 2 Pick. Rep. 267; *Willington v. West Boylston*, 4 id. 103; *Chandler v. Thurston*, 10 id. 209; *McClure v. Pyatt*, 4 McC. Rep. 26; *Byrd v. Boyd*, id. 246; *Shaw v. Turnpike Co.* 2 Pennsylv. Rep. 454; *Rounds v. Baxter*, 4 Greenl. Rep. 454; *McMillan v. Vanderlip*, 12 Johns. Rep. 165; *Norris v. Moore*, 3 Ala. Rep. N. S. 676; *Brumby v. Smith*, id. 123.]

There are also a class of cases which proceed upon the ground that there can be no recovery upon a *quantum meruit*, or general *indebitatus assumpsit* for any thing done under a special agreement, which remains open. [*Hulle v. Heightman*, 2 East Rep. 145; *Watkins v. Hodges, &c.* 6 H. & Johns. Rep. 38. So there are cases in which it is decided if the terms

of the special agreement have been performed on one side, and nothing is to be done on the other but pay money, such payment may be enforced by an action of *indebitatus assumpsit*. [Alcorne v. Westbrook, 1 Wil. Rep. 117; Cook v. Munstone, 1 B. & P. Rep. 354; Perkins v. Hart, 11 Wheat. Rep. 237; Feeter v. Heath, 12 Wend. Rep. 477; Way v. Wakefield, 7 Verm. Rep. 228; Bank of Columbia v. Patterson, 7 Cranch's Rep. 299; Stout v. Gallagher, 2 Marsh. Rep. 160; Miles v. Moody, 3 S. & R. Rep. 211.] There are also cases in which work has been done or goods supplied under a special agreement, but not in conformity thereto, and yet the payment of a proper equivalent is enforced by action, because the defendant has retained and enjoyed the benefit of that which was actually done. [Farresworth v. Gerrard, 1 Camp. Rep. 38; Read v. Rann, 10 B. & C. Rep. 440; Linningdale v. Livingston, 10 John. Rep. 36; Raymond v. Bearnard, 12 id. 274; Goodrick v. Lafflin, 1 Pick. Rep. 57; Fitch v. Sargeant, 1 Ham. Rep. 352; Wadleigh v. Sutton, 6 N. Hamp. Rep. 15; Haywood v. Leonard, 7 Pick. Rep. 181; Smith v. Proprietors of Meeting House in Lowell, 8 id. 178; Merrill v. J. and O. Rail Road Co. 16 Wend. Rep. 586.] And under some circumstances one party has been permitted, even while the special contract remains open, to put an end to it, and sue for what has already been done under it, upon a *quantum meruit*. [Withers v. Reynolds, 2 B. & Ad. Rep. 882; Planche v. Colburn, 8 Bing. Rep. 14; Gary v. Hull, 11 John. Rep. 441; Danforth v. Dewey, 3 N. Hamp. Rep. 79; Shaw v. Lewistown T. Co. 3 Pennsylv. Rep. 445.]

We have seen that the death of one of the parties will not rescind an entire contract, the performance of which was necessary to entitle him to demand the payment of money, so as to authorize his personal representative to recover upon a *quantum meruit*. The rescission of the contract, where neither party is in fault, or it is not provided for by its terms, as a general rule, requires the assent of both parties. [Chitty on Con. 4 Am. ed. 572-3-4.]

None of the principles we have stated in regard to special contracts, or conditions precedent, show that they are abrogated or dispensed with by death, as to the party who was to do the prior act. True if there has been a part performance, by

doing labor or furnishing goods, the party who is in default for not completing his undertaking, may recover of the other in *indebitatus assumpsit*, if he has received and retained a benefit; for the acceptance and enjoyment of that which is valuable, forms a new consideration, for which the law implies a promise to pay. But this principle does not apply to cases like the present where a party agrees to render service for a definite time, for a sum *in numero*, to be paid at the expiration of that time. Here the rendition of the service according to the contract is indispensable to the right to compensation, and the benefit derived is neither visible or tangible, as it is, where one does work on a house, &c. or supplies part of a lot of goods. In *McMillan v. Vanderlip*, [12 John. Rep. 165,] the plaintiff agreed to work for the defendant ten and a half months and spin yarn at three cents *per run*; and afterwards left the service of the defendant, and brought an action against him for spinning eight hundred and forty-five runs of yarn at three cents *per run*; it was held that the plaintiff's contract was entire, and must be performed as a condition precedent before he could maintain an action against the defendant for the price of his labor.

It is supposed by the defendant's counsel, that this Court, in *Greene v. Linton et al.* [7 Poter's Rep. 133.] determined that it was competent for a party who was prevented by sickness from performing a year's labor, according to his contract, to recover a compensation *pro rata* for such time as he had rendered service. In that case the Court say, "If, by the contract of the parties, the plaintiff has stipulated *absolutely*, that he will serve the defendant for twelve months, and the service for the whole time is a *condition* to be performed before he can be entitled to any compensation, there is an end of the case; because, by his own statement, he admits that during a portion of the time, he did not render the services contemplated by the agreement." The Court was of opinion that the nature of the contract, the object of it, and the intention of the parties, indicated that a complete performance was not a prerequisite to the plaintiff's right to recover a proper equivalent for his services; that as the plaintiff did work in the blacksmith shop, the profits derived from which were susceptible of exact estimation, the acceptance and appropriation of those profits form-

ed a consideration from which the law would imply a promise to pay. Much additional reasoning is employed, but what we have said will sufficiently show that the case does not sustain the position for which it was cited.

In the case at bar, the Court erred in refusing to charge the jury that if the intestate's contract was entire, and according to the stipulation of the parties was to be performed *in toto* before the defendant became liable to pay his wages, the plaintiff could not recover without proof of a complete performance. The intestate's services, up to the time of his death, were not susceptible of appreciation, and, besides, were accepted with the *express* understanding that they would be continued throughout the year.

However just it might be to permit recoveries in all cases where the party to be paid has been prevented from performing his contract by death, we cannot modify the agreement of parties so as to effect such a result. We must execute them as they have been made, according to those principles which have been sanctioned both by time and authority.

We have only to add that the judgment of the Circuit Court is reversed and the cause remanded.

RYLAND v. BATES.

1. In a suit by the assignee against the assignor of paper not mercantile, it is necessary to aver in the declaration that suit was brought against the maker to the first Court after the maturity of the note to which suit could be brought, or an excuse for not bringing it.

ERROR to the County Court of Mobile.

Assumpsit by defendant in error against plaintiff in error, as indorser of a promissory note for thirty-six hundred dollars, executed by McRae and Laing to the plaintiff in error, and by him indorsed to the defendant in error.

Ryland v. Bates.

The first count of the declaration does not charge that suit was brought against the maker of the note to the first Court to which it could be brought after the maturity of the note, or aver any excuse for not bringing suit, but charges that when the note became due it was presented to the maker for payment, and that notice of the non-payment was given to the indorser. To this count there was a demurrer which the Court overruled.

The judgment of the Court on the demurrer is now assigned for error.

CAMPBELL, for plaintiff in error.

JOHN GAYLE, contra, to maintain the judgment of the Court below, insisted that the statute which required the maker of a note to be sued to the first Court after the maturity of the note and a return by the sheriff of "no property," in order to charge the indorser, did not operate on the contract, but on the parties to it. It conferred certain privileges on defendants and imposed certain duties on plaintiffs, as conditions to be complied with before the Court could be called on to enforce the contract. That it was analogous, to the statute of frauds and limitations, which did not change the contracts on which they operated, but were matters of defence.

This he insisted was the character of this statute, and that the omission to sue the maker, as the statute required, was matter of defence. He cited 1 Chitty Pl. 256, 332; Minor, 251; 1 Stewart, 51.

ORMOND, J.—The statute by which this question must be decided, makes all contracts assignable, and gives to the assignee the right to sue in his own name, "provided suit be brought to the first Court of the county where the maker resides, to which suit can be brought, and if he shall fail to sue the maker to the first Court as herein provided for, the indorser shall be discharged from liability unless suit shall be delayed by his consent." [Aik. Dig. 330.]

The previous section of this law had declared that bills of exchange, foreign and inland, and promissory notes payable in bank, should be governed by the rules of the law merchant,

Sample et als v. Royall.

and we think it cannot admit of a serious doubt, that the contract of an indorser of mercantile paper, or that of an assignor of paper not mercantile, is conditional, and that to establish his liability, the condition must be shown to have been performed. The liability of an assignor of paper not mercantile, is not an absolute one, to be defeated if the assignee does not bring suit against the maker as required by the statute, but is dependent on the performance, by the assignee, of the condition.

The bringing suit as required by the statute, where no excuse exists for the omission, is a condition precedent to the right of the assignee to recover, and must therefore be averred in the declaration.

We are unable to perceive the difference between the case of an assignor under the statute, and that of an endorser under the law merchant, as it respects this question, and it would be quite as proper to permit a recovery against the latter where there was no averment of demand and notice, as against the former, when no suit was averred to have been brought, or excuse offered for not bringing it.

Let the judgment be reversed and the cause remanded.

SAMPLE ET ALS V. ROYALL.

1. No summary proceedings by motion can be sustained against a sheriff and his securities for failing to return a writ of *capias ad respondendum*. The act of 1821, requiring sheriffs to return all writs and executions three days before the term to which they are returnable, does not impose any new penalties, and none but the common law liabilities then existed for failing to return an ordinary writ.

WRIT of Error to the Circuit Court of Autauga county.

This is a summary proceeding, by motion, against a sheriff and his securities, for failing to return a writ of *capias ad res-*

pondendum. The defendants demurred to the notice and their demurrer being overruled they pleaded over, and a verdict was found against them, on which judgment was entered. The judgment entry discloses all the facts and circumstances, from which the jurisdiction of the court is to be supported or denied.

The writ of error is prosecuted by the sheriff and his securities to revise this judgment, and the assignments of error question the jurisdiction of the court to entertain the motion.

HAYNE, for the plaintiff in error, insisted that none of the legislation subsequent to the act of 1821, [Digest 279, §119,] gives any summary proceeding against a sheriff or his sureties for such a default as this. The act of 1821 was intended solely to give a new return day, and ought not to be so construed as to confound the remedies on executions, with those upon ordinary writs.

ELMORE, *contra*, contended that the several acts giving summary remedies against sheriffs are remedial in their nature, and ought therefore to be construed so as to advance the remedy and repress the mischief.

The act of 1821, provides that a sheriff failing to return a writ or execution three days before Court, shall be liable to all the penalties of the laws then in force for failing to return any writ or execution.

This must be construed to give the same remedy for failing to return a writ, as then existed for failing to return an execution; because the intention to give some remedy by this act is evident from its terms.

GOLDTHWAITE, J.—We are clear in the opinion that this judgment cannot be sustained. The act of 1821, under which the proceedings were instituted, is in these words—“It shall be the duty of the sheriffs of the several counties in this State to return all writs and executions to the Clerk’s office from which they shall issue, at least three days previously to the term of the Court to which they shall be returnable; and if any sheriff shall fail to return any writ or execution according to the provisions of this act, he shall be liable to all the penalties provided by the laws now in force for failing to re-

Dodge & McKay v. McKay and McDonald.

turn any writ or execution to the first day of the term of the Court in which they are returnable. [Digest, 279, §119.]

This act does not give any new remedy against the sheriff; the sole change intended was in the return day of writs and executions, which was provided to be three days previous to, instead of the first day of, the Court.

We cannot perceive that there is any foundation in the terms used by the act, for the supposition that the legislature intended to give the same remedy on writs as then existed for failing to return executions; to construe the act in this manner would be to give a remedy which was not authorized by the then existing laws, and consequently would make the sheriff liable to an additional penalty, in direct opposition to the words of the act.

Let the judgment be reversed.

**DODGE & MCKAY, SURVIVING PARTNERS, v. MCKAY AND
MCDONALD.**

1. Where parties entered into a covenant by which they agreed to submit certain matters to arbitration, and each stipulated to perform particular duties consequent upon the making of the award; it is enough for the party suing for a breach of covenant, to allege a performance of every specific duty enjoined by his part of the contract, notice to the defendant that the award was made, and that he refused to comply with his engagement.
2. Where an action is brought upon a covenant to submit to arbitration, alleging a failure by the defendant to perform an act which he had stipulated to do when the award was made, the defendant is not entitled to *oyer* of the award; but if it is craved and granted, the plaintiff cannot insist on error, that it was not regularly grantable.
3. Upon a demurrer to the declaration, its sufficiency cannot be determined by a reference to the indorsement on the writ or other part of the record.
4. Where a partnership sues upon a covenant executed in the firm name, they admit that it is their deed, and the defendant cannot be allowed to object that it is invalid, because a seal has been used by one of the partners to bind his co-partners.

Dodge & McKay v. McKay and McDonald.

WRIT of Error to the Circuit Court of Barbour.

This was an action of covenant by the plaintiffs in error, and David C. Kolb, their deceased partner. The declaration contains three counts. The first is upon a writing under seal, entered into between the plaintiffs and a firm, trading under the style of Kolb & McKay, and John McKay as principal, and Hugh McDonald as his surety. By this writing it is alledged that John McKay and Hugh McDonald, in the characters aforesaid, did agree to give their promissory note, payable to the plaintiffs, twelve months from the date thereof, for whatever sum certain arbitrators, chosen on the day of the date of the writing by the plaintiffs and the defendant, John McKay, to settle and determine certain matters in controversy between them, might decree; which was to be added to the amount of two promissory notes payable to Kolb & McKay, and interest thereon. These two notes then being in suit in Charleston, South Carolina. To these sums the further addition was to be made of accounts between the plaintiffs and John McKay, then in suit in Charleston, South Carolina. *And further*, the plaintiffs and Kolb & McKay, on their part, did agree to abide and perform whatever might be the award of the arbitrators so chosen. This count states the date of the agreement, the amount of the notes and accounts which were sued in South Carolina; alleges the making of an award as provided by the writing, its amount and notice thereof to the defendants; avers the performance by the plaintiffs of every duty enjoined upon them according to the terms of their engagement, and a demand of a note of the defendants, payable at the time when, and for the amount stipulated by the writing: and concludes with an averment that the defendants have broken their covenant by a refusal to give their note, according to their obligation.

The second and third counts state the covenant differently from the first, alledge the performance of every duty incumbent on the plaintiffs, and the non-performance of the defendants' engagement in giving the plaintiffs their note, &c.

The defendant's cravedoyer of the award, set it out *in ex-tenso*, and demurred to the entire declaration; the demurrer

Dodge & McKay v. McKay and McDonald.

was sustained and a judgment rendered against the plaintiffs for costs.

HARRIS, for the plaintiff in error. The Circuit Court should not have sustained the demurrer, for the entire declaration is good; but if there be one good count it is enough, in the form in which the demurrer is interposed.

The defendant was not entitled to oyer of the award, for it was not the foundation of the action, but only evidence. The agreement of the parties under seal, is the gravamen of the declaration, and of that only was oyer allowable.

The Court could not have looked to the agreement indorsed on the writ, to see whether it corresponded with the declaration, or was executed so as to bind the parties. Had it been intended to insist upon a variance, the agreement should have been set out on oyer.

No counsel appeared for the defendants.

COLLIER, C. J.—1. We are at a loss to conjecture the causes for which the demurrer to the declaration was sustained. Each of the counts seem to us to disclose a good cause of action, and to be drawn with care, if not unnecessary particularity. But as the demurrer is to the entire declaration, it is quite sufficient if either count be good.

The action is founded upon the covenant of the parties to abide by the award of the arbitrators, and the stipulation of the defendants to give their note at twelve months date, for the sum awarded to the plaintiffs as due from McKay, as also for notes and accounts in suit against him in Charleston, South Carolina. The declaration alleges the making of an award for a sum certain in favor of the plaintiffs, notice of the fact by the defendants; and a refusal by them to make the note. Here is an allegation of a direct breach of covenant by defendants, and one from which injury may result to the plaintiffs. If an action could not be maintained under such circumstances, the plaintiffs could not resort to McDonald as a surety, notwithstanding his express undertaking for his co-defendant. Such an idea cannot be tolerated.

2. Where a deed is pleaded with a profert either by the

Dodge & McKay v. McKay and McDonald.

plaintiff or defendant, the other party may have oyer of it, if the profert was necessary. [2 Salk. Rep. 497.] But where the declaration is upon a sealed instrument, which stipulates to perform a duty provided for in another writing, the defendant cannot have oyer of the other writing. [1 Saund. Rep. 8; id. 405, n. 1.] If oyer be craved where it is not demandable, the other party may treat it as a nullity; but if, instead of doing this, he grant the oyer, it is said the party who craved it may consider the whole instrument as if it were pleaded by his adversary. [2 Doug. Rep. 476-7; 1 Saund. Rep. 317, n. 2.] To refuse oyer when it ought to be granted, has been held to be error. [2 Strange's Rep. 1186; 1 Wil. Rep.] But it is said error will not lie for granting oyer where it is not demandable. [1 Saund. Rep. 9, b.; 2 id. 46, b.]

In the case before us it is deducible from the principles we have stated, that oyer could not have been demanded of the award. It could not be regarded as the basis of the action, but only as a part of the proof to sustain the allegation of a fact occurring after the covenant was entered into by the parties. But the granting of oyer did not work an injury to any one. The award does not show that the plaintiff is not entitled to recover, but rather proves every thing for which the plaintiffs in their declaration rely on it. And though oyer was improperly granted, we have seen that it furnishes no ground for the reversal of the judgment.

3. Upon a demurrer to the declaration the Court should not have looked to any other part of the record to determine it to be insufficient. But even if the demurrer brought to the view of the Court the indorsement on the writ, it should not have been sustained. True, the writing sued on, was executed by David C. Kolb, for Dodge, Kolb & McKay, and for Kolb & McKay; yet this does not show its invalidity, for the act may have been authorized by his partners, and the fact of bringing a suit on it, shows that they adopted it, which is equivalent in law to a previous authority.

Where a partnership is sued upon a sealed instrument, executed by one of its members in the name of the firm, the proper mode of taking advantage of it by the members not authorizing, or assenting to it, is by the plea of *non est factum*. But where they sue on an indenture thus executed, we cannot con-

Pitts v. Curtis.

ceive how, or why, the defendant should object to the execution by the plaintiffs.

In any view taken of this case we cannot discover a sufficient reason for sustaining the demurrer. The judgment is consequently reversed and the cause remanded.

PITTS v. CURTIS.

1. Where a father by will gave to his son a slave until the slave attained the age of twenty-one years, and the remainder of the life of the slave to his daughter, then a married woman—Held, that the right of the husband to the slave was perfect on the assent of the executor to the legacy, that the possession of the tenant of the particular estate was the possession of the tenant in remainder—and that the right to the slave survived to the husband upon the death of the wife before the termination of the particular estate.

ERROR to the Circuit Court of Dallas.

Detinue for a slave by the defendant in error against the plaintiff in error.

Upon the trial below it was in evidence that the plaintiff, had married the sister of the defendant in 1828—that the father of the defendant and plaintiff's wife, by his last will and testament, made a disposition of the slave in controversy in the following words: "I give and bequeath unto my son Noel Pitts, a negro boy named Jacob, until he arrives at the age of twenty-one, and the remainder of his life to my daughter Henrietta Pitts." The negro boy became twenty-one years of age in the year 1839, went into possession of defendant under the will and has so remained ever since. Henrietta, wife of plaintiff, died in 1836. There was proof of demand and refusal.

Upon this state of facts the Court charged the jury that the facts if true, authorized the plaintiff to recover the slave, to which the defendant excepted.

Judgment was rendered for the plaintiff. The errors assigned question the propriety of the charge of the Court.

LAPSLEY, for the plaintiff in error, insisted that the negro in question belonged to the representatives, or next of kin, of the wife; that the husband was not entitled to it, because it never had been reduced into possession. [3 Stewart, 375; 9 Porter, 636; 2 Nott & McCord, 147.]

That the cases relied upon from Kentucky were not applicable, because made in reference to statutes entirely unlike ours, by which slaves were considered real estate.

R. SAFFOLD, contra, maintained that this was not a chose in action, but a vested interest in the slave, which would have gone to the representatives of the husband if his wife had survived him. That the possession of the son, taking the particular estate, was the possession of those in remainder. [2 Call, 447; Clancy on Rights, 11; 8 Porter, 36; 3 Littell, 275; 4 id. 356; Litt. Sel. Cases, 331; 4 Bibb, 174; 1 H. B. 535; Coke Litt. 351, note a.; 1 Cruise Dig. 59; 3 Wilson, 521; 3 Term, 631; 7 id. 390; 8 id. 213.]

To show that where the cause of action has its inception before marriage, but is completed afterwards, the husband and wife may join, or may sever in trover or trespass, but that in detinue the husband must sue alone, he cited 1 Chit. P., 6 ed. 85, 139; 1 Sel. N. P. 546; 2 Murphy, 351.

ORMOND, J.—As the husband is not entitled to the *choses in action* of the wife not reduced into possession during the coverture, the precise question presented on the record is, whether the right of the wife of the defendant in error to the slave in controversy, under the will of her father, was a present vested interest, or a right in action merely.

In the case of Magee v. Toland, [8 Porter, 40,] this Court defines a chose in action to be “any right to damages, whether arising from the commission of a *tort*, the omission of a duty, or the breach of a contract.” The bequest in this case was of a slave to a son of the testator, until the slave attained the age of twenty-one, and the remainder of his life to the wife of the defendant in error. This remainder in the slave cannot

in any sense be considered a right to damages, but was an absolute vested interest in the slave, the enjoyment of which was postponed for a certain ascertained period.

It is of no moment that the actual occupancy, or right to the present possession for an ascertained period, was in another, that is nothing more than exists in every bailment, and no principle is better ascertained than that the possession of the bailee is the possession of the bailor. The rule of law is that the general property of a chattel draws to it the possession. The special property being in the plaintiff in error, his possession of the slave was consistent with, and was in law the possession of the tenant in remainder, who had the general property in the slave.

Such being the law, the right of the husband was perfect upon the assent of the executor to the legacy, which is shown in this case. He might have sold and transferred it before the particular estate was at an end; upon his death before his wife it would have gone to his representatives and by necessary consequence having survived his wife, the title vests in him.

These consequences all legitimately flow from the principles settled in *Magee v. Toland*, and such has been the decision of other Courts in similar cases. The case of *Bank's adm'r. v. Marksbury*, [3 Litt. Rep. 275,] is expressly in point, and is admitted to be so by the counsel for the plaintiff in error, but he insists that that decision is founded on a statute of Kentucky, by which slaves are considered as real estate. But the statute to which he refers, was expressly designed to give to slaves bequeathed or conveyed to a married woman all the attributes of personal property. The decision referred to is not based upon a statute, but was determined upon the general principles of the common law.

There is no error in the judgment of the Court, and it is therefore affirmed.

CLARK v. STRINGFELLOW.

1. The act which requires a Justice of the Peace in a suit of forcible entry to note on his docket the reasons for the admission or rejection of evidence, is directory merely, and the omission will not prejudice either party.
2. The defendant in a forcible entry suit, cannot give in evidence a sheriff's deed to show a determination of the plaintiff's title. The question to be tried is with respect to the actual possession, and no controversy can be raised as to the merits of the title.
3. Where a tenant of the plaintiff voluntarily surrenders possession to the defendant upon a claim of title, this entry is by collusion with or under the tenant, and therefore the entry is within the act.
4. Although the landlord may be permitted by a Justice to defend the possession of his tenant when sued for a forcible entry, yet the judgment is properly entered against the tenant in possession.

ACTION for an unlawful detainer of a certain piece of land situate in the city of Wetumpka.

The suit was commenced before a Justice of the Peace by Clark against Stringfellow, and after judgment in favor of Clark, was removed into the Circuit Court by certiorari, where the judgment was affirmed.

The regularity of the proceedings previous to the trial of the case is not questioned here, but the points relied on to reverse the judgment of the Justice arise out of the proceedings had at the trial. These were as follows:

The parties appeared by attorney, and it being shown that Clark was a non-resident. Josiah Camp acknowledged himself security for costs. The defendant then moved the Justice that Wm. N. Thompson should be made a co-defendant; and he was so made against the objection of the plaintiff. The defendant then pleaded not guilty, but the transcript does not show whether this defendant was Thompson or Stringfellow. The jury were then sworn, and one Edward Camp, a witness for the plaintiff testified that Clark was in possession of the premises in 1838, and made the improvements thereon; that Clark rented the premises to various persons, down to the year 1840; that he, as the agent of Clark, rented the premises to one

Clark v. Stringfellow.

Saunders, in November, 1840, for one year, and Saunders rented the same to William N. Thompson, who rented them to Stringfellow, in October, 1841.

The plaintiff proposed proving notice and demand of the premises by this witness, as his agent, and the question being put, whether the witness was the authorized agent of Clark, to act in the matter, the defendant objected, but the witness was permitted to answer, and he then testified that he was the duly authorized agent of Clark, and as such agent he served a notice on Stringfellow with a demand for the possession, on the 10th December, 1841.

R. Saunders was then called as a witness for the defendant, and testified that he rented the premises from Camp as previously stated; that some time in the summer he removed to Harrowgate, and gave possession of the premises to Edwards, as the agent of Thompson; that Thompson gave him notice that he had purchased the premises at sheriff's sale, when it was sold as Clark's property. The plaintiff opposed and objected to the introduction of this evidence.

S. F. Edwards, also a witness for the defendant, testified that he, as agent of Thompson, received possession of the premises from Saunders, in the summer of 1841, and about that time notified Saunders that his principal had purchased the property at sheriff's sale; and also that about the middle of October, he rented the premises to Stringfellow, whom he placed in possession—the witness acting as the agent of Thompson.

The defendant then offered to read to the jury a deed executed by the sheriff of Autauga county to him, for the premises in question, as well as the record of the judgment and execution under which they were sold as Clark's property. This was stated to be offered for the purpose of showing that the reversionary interest in the property had passed from Clark to Thompson. This deed and record was rejected at the instance of the plaintiff.

The verdict of the jury was that the defendant was guilty, and thereupon the Justice rendered his judgment, convicting Stringfellow of an unlawful detainer of the messuage and its appurtenances, and gave judgment of restitution of it to Clark, as well as for costs.

The assignment of error in the Circuit Court was upon the whole record.

ELMORE, for the plaintiff in error, made the following points:

1. That Camp was permitted to testify, and the record rejected without the reasons of the Justice being entered on his record. [Dig. 205, §16.]

2. The rejection of the records, because they showed the determination of Clark's estate, and were offered for that purpose only.

3. The judgment of the Justice should have been against Stringfellow and Thompson, and not against Stringfellow alone.

GEO. GOLDTHWAITE, contra.

GOLDTHWAITE, J.—1. The sixteenth section of the act under the title of forcible entry and detainer, requires the Justice of the Peace to enter upon his minutes or docket true copies of the complaint, summons, *venire*, their respective returns, the names of the jurors, their verdict, and the judgment thereon: also the names of the witnesses, the admission of evidence objected to, the rejection of evidence offered, the reason for such admission or rejection, and all other proceedings touching the complaint. [Dig. 205, §16.]

The object of these requirements is to secure a correct and faithful record of all the proceedings had before the Justice, but it never could have been intended that the omission to comply with them should affect either party injuriously. It is not probable that the reasons of the Justice would influence the decision of an appellate Court, and whether good or bad would neither warrant the admission of illegal, or the rejection of legal evidence. Hence we conclude that no advantage can be had in this Court of the omission by the Justice to state his reasons for the admission of the witness, or for his rejection of the records.

2. The rejection of the sheriff's deed and the transcript of the record, showing its regularity, was proper, because this evidence would necessarily involve an examination of the merits

Clark v. Stringfellow.

of Thompson's title, under which he claims to be in possession. This was not the question before the jury, but they were called on to inquire whether Stringfellow was in possession *under, or by collusion with, the tenant of Clark*.

It is said this evidence was offered only to show a determination of Clark's estate, but the most superficial examination will show that this could not be ascertained without inquiring whether this determination was produced by the existence of a legal title in another. The statute of forcible entry was intended to protect possession; and the purchaser of the title at a sheriff's sale has no more right to enter without the consent of him who is in possession, than any other person with a lawful title.

In the present case, it appears that the tenant in possession voluntarily gave it up to the purchaser under the sheriff's sale, but this did not invest the latter with a lawful right to hold against the landlord. The 5th section of the act expressly provides for such a case, for here the defendant was *in, under, or by collusion with the tenant*, and is therefore subject to be removed by this process.

3. We do not think there is any error in not rendering a judgment against Thompson. He was permitted by the Justice to defend the case, in consequence of his connection with the defendant on the record; but there is nothing in the statute which requires or authorizes the Justice of the Peace in admitting the landlord as an actual party defendant in such a case.

It was therefore proper to render the judgment against Stringfellow, without connecting his landlord with him.

We are unable to perceive any error affecting the merits, and the judgment is affirmed.

WISWALL v. GLIDDEN.

1. Where a cause in which it is proposed to try the right of property under the statute, is not placed upon the docket of the Court for several terms after the bond and execution is returned—*Held*, that the failure of the Clerk to docket it, does not operate a discontinuance; and if stricken from the docket, a *mandamus* will be granted to reinstate it.

WRIT of Error to the County Court of Mobile.

The plaintiff in error having recovered a judgment against Jesse Turner, caused a *fieri facias* to be issued thereon and placed in the hands of the sheriff of Mobile. This execution was levied on a negro man, to whom the defendant interposed a claim, and entered into bond with surety for the prosecution thereof, pursuant to the statute. The bond bears date the 22d July, 1840, but the case of the trial of the right of property was not placed upon the docket of the County Court, to which it was properly returnable, until the February term, 1842, after two or three terms had intervened since the execution of the bond: whereupon the County Court, for the reason that the cause was not placed on the trial docket in time, determined that it should be stricken therefrom; which was accordingly done, and thereupon the plaintiff in execution excepted, &c.

STEWART, for the plaintiff in error.

No counsel appeared for the defendant.

COLLIER, C. J.—The statutes in respect to the trial of the right of property levied on by execution and claimed by a third person, require the sheriff to return the fact of the claim, together with the execution, to the Court from whence it issued; and an issue is to be made up either in that Court, or if the levy was made in another county, then in the Circuit Court of the latter, to try the question of right. The issue is to be made up under such rules as the Court may adopt; and “the burthen of proof shall be upon the plaintiff in execution.”

Further. "Whenever any claim to property shall be made, the same shall not be dismissed, discontinued or withdrawn, but by the consent of the opposite party." [Aik. Dig. 167 to 171.]

It is provided by statute, as well as by rule of Court, that each Clerk shall keep a docket, in which shall be entered all causes returned to his Court for trial; and it is enacted, that "all causes remaining on the docket of any Circuit Court, at the rising thereof, shall be continued over of course, for trial at the next succeeding term." [Aik. Dig. 284.] The question raised upon the record, in this cause, is, whether the failure of the Clerk to docket the claim of property, operated a discontinuance of the case?

It was certainly the duty of the Clerk to have entered it upon his docket, but his neglect cannot, it is conceived, prejudice either party. By declaring that all causes on the docket not disposed of at the close of the Circuit Court, shall be continued until the next term, the statute does not discontinue all that are not docketted, or deny to the Court the right to permit them to have a place on the docket at a succeeding term. To say nothing of the character of the proceedings in the present case, which was originated by the act of the claimant, it may well be questioned if it was indispensable to its pendency in Court, that it should be docketed, whether there could be a discontinuance until this was done.

The correct practice, and one which will protect the rights of all parties, is, for the County Court, on motion of either party, to allow the cause to be placed on its docket; unless some sufficient cause is shown to the contrary—as, that it had been settled, &c.

But as there is no judgment disposing of the cause, the writ of error cannot be sustained; the appropriate remedy will be in the event of the County Court refusing to grant the motion which we have indicated would be proper, to move for a rule upon that Court to show cause why a *mandamus* should not be awarded. [Stephenson & Chapman v. Mansony, at this term.]

Let the writ of error be dismissed.

Tarlton et al v. Herbert.—Miller v. Gee.

TARLTON ET AL V. HERBERT.

1. It is not necessary in a suit against partners, to describe them as such in the writ.

ORMOND, J.—The writ is sued out against John Tarlton and Seymore Bates, and returned executed on Tarlton alone. The declaration is against them as partners, and judgment by default against both.

The objection here taken is that the defendants should have been described on the writ as partners.

The general doctrine is, that upon general process the plaintiff may declare specially. [Tidd's Practice, 403.] It was not therefore necessary to describe the defendants as partners in the writ; and as a service on one partner is, by statute, a service on all, the judgment against both was correct, and must be affirmed.

MILLER v. GEE.

1. An administration bond is an official document appertaining to the administration, and cannot be removed from the office of the Clerk of the Orphans' Court, without a breach of his official duty—when necessary to be given in evidence an examined copy, or one verified by the certificate of the proper officer, is sufficient, without producing or accounting for the original.
2. In an action against a surety on an administration bond, it is necessary to shew that assets came to the hands of the administrator, and the surety is responsible only to the extent of the devastavit. After the plaintiff has shown what amount of assets came to the hands of the administrator, it rests with the defendant to show that they have been lawfully appropriated.

Miller v. Gee.

WRIT of Error to the Circuit Court of Wilcox county.

Action of debt on an administration bond. The declaration sets out the bond, and recites that the plaintiff recovered a judgment in the Circuit Court of Wilcox county, at the fall term, 1836, against one Sterling H. Gee, as the administrator of Joseph Gee, deceased, upon which he sued out a writ of *fiery facias*, against the said administrator, to be levied of the goods and chattels of the intestate in his hands to be administered, which writ was returned *nulla bona*.

The declaration then avers, that at the time of the rendition of the said judgment, there were goods and chattels which were of the said intestate at the time of his death, to the value of the judgment aforesaid, which came to the hands of the said administrator, and were by him wasted, and converted to his own use, and it concludes with a breach in not paying the penalty of the bond.

The cause was tried on the issue of *nil debit*, and a verdict found for the plaintiff, on which judgment was rendered.

At the trial the plaintiff offered no evidence of a devastavit by the administrator, except the judgment recited in the declaration, the execution thereon and its return. The defendant requested the Court to instruct the jury, that unless it was shown by the other proof, that the effects of the intestate had come into the hands of the administrator, and had been wasted by him, that the plaintiff could not recover.

This was refused, and the jury was charged that the judgment, &c. was sufficient evidence to charge the defendant with the amount of the judgment.

The plaintiff offered to read the record of the administration bond, without producing the bond, and for this purpose proved by the Clerk of the Court that he had delivered the bond to an attorney, since dead, for the purpose of bringing this suit. Other evidence was offered conducing to show that the bond was never returned by the attorney, and that it never came to the hands of his administrator, though it was shown that there were papers of the attorney which had never been examined, and which had never come into possession of his administrator. The Court admitted the record of the bond as evidence.

The defendant excepted to its admission and also to the

charge given and refused by the Court, and now assigns errors covering these several matters.

LAPSLEY, for the plaintiff in error, relied on the case of *Thompson v. Searcy*, 6 Porter, 394.

PEARSON, *contra*, cited *Burke v. Adkins*, 2 Porter 236; 1 Saund. 219, b. note 8.

GOLDTHWAITE, J.—Although the bond of an executor is not expressly required by any statute to be recorded, it is nevertheless a document which is committed to the custody of the Clerk, and cannot be taken from his office without a violation of his duty. There may be cases, possibly, when its withdrawal might be warranted by an order of the Orphans' Court, but ordinarily it should remain with the other papers, appertaining to the administration. By the thirteenth section of the act of 1806, [Digest 177, §3,] it is provided that such a bond shall not become void on the first recovery, and may be put in suit and prosecuted from time to time against all or any one or more of the obligors, in the name and at the cost of any person or persons injured by a breach thereof, until the whole penalty shall be recovered thereon. From this it results that the bond cannot be removed, and is properly proved by an examined copy, or by one certified by the proper officer. It was therefore unnecessary for the plaintiff to have laid any foundation for the admission of the record, as that was of equal dignity with the original bond, and the copy was properly admitted in evidence.

2. The action is against one of the sureties of the administrator, and it was essential to show what amount of assets came to the hands of the administrator, in order to make out a *devastavit*. It appears that this bond was executed the 19th February, 1825; at this period no administrator was liable out of his individual estate, for not pleading, mispleading, or false pleading in, or to, any action whatsoever; it may therefore be questionable whether the judgment and execution of themselves would be sufficient evidence to charge the administrator with a *devastavit*, if the suit was against him, but the act of 1826 expressly enacts, that no security for an executor or adminis-

trator shall be chargeable beyond the assets of the testator or intestate on account of any omission or mistake in pleading of the executor or administrator. [Dig. 184, §34.]

This matter was considered in the case of *Thompson v. Searcy*, [6 Porter, 394,] and it is there said, that as the surety can only be liable to the amount of assets, it will be necessary for the jury, not only to find the issue for the plaintiff, but also the extent to which the administrator has wasted the assets.

It was not intended by these remarks to intimate that when the action is on the bond that the jury must ascertain by their verdict the precise extent to which the assets were wasted, but merely that a recovery could be had against a surety only to the extent of a devastavit. The cases there cited are full to the precise point involved in this case, and no peculiar hardship is imposed on the plaintiff, as he can always throw the burthen of proof on the defendant, by showing the amount of assets which came into the hands of the administrator; when this is once established, it rests with the defendant to show they have been lawfully appropriated.

The Circuit Court erred in considering the judgment as evidence of assets, and the return of *nulla bona* as sufficient evidence of a devastavit, and for the error in the charge the judgment is reversed and the cause remanded.

COPE v. WILLIAMS.

1. One who has made a parol contract for the purchase of land, paid one half the purchase money, and retains the uninterrupted possession, cannot maintain an action against the vendor for the recovery of the money received by him.

THIS was an action of *assumpsit* in the Circuit Court of Pike, by the defendant in error against the plaintiff. The declaration contains the common counts, for work and labor done, goods, wares and merchandize sold and delivered, money lent

Cope v. Williams.

advanced, paid, laid out and expended, money had and received, and upon an account stated. The cause was tried on the pleas of *non assumpsit*, set off and payment.

At the trial the defendant excepted to the instructions of the presiding Judge to the jury. From the bill of exceptions it appears that the defendant had sold to the plaintiff the quarter of a quarter section of land for the sum of two hundred dollars, one hundred of which sum was to be paid in hand, the residue some short time thereafter. The plaintiff paid to the defendant a mare at the price of one hundred dollars; to recover back that sum this action was brought. The defendant had been, and continued up to the trial in peaceable possession of the land under his purchase, the occupancy of which, with its improvements, was worth from sixty to seventy-five dollars annually. The possession of the plaintiff had continued for three years. The sale from the defendant to the plaintiff of the land was not evidenced by writing, but the plaintiff had offered to pay the residue of the purchase money in notes, which offer was rejected unless he would insure their collection.

The defendant prayed the Court to charge the jury, that the purchaser of land taking and remaining in possession thereof, could not maintain an action against the vendor for the recovery of the money paid by him on such purchase; which charge was refused by the Court. *Further*, that the rent of the land for the three years during which it had been in the plaintiff's possession, was a fair set-off against his demand; which charge was also refused, on the ground that it was not pleaded.

LEWIS, for the plaintiff in error.

HARRIS, for the defendant.

COLLIER, C. J.—In *Allen v. Booker*, [2 Stew. Rep. 21,] it was determined that an action of *assumpsit* lies to recover back money paid on the purchase of land by parol, on the ground that such a contract was void by the statute of frauds. It is not expressly shown by the report of the case, that the purchaser was even in the possession of the land, or whether he did any act indicative of an intention not to perform the contract on his part other than to bring suit. And the Court

place their conclusion upon the reason, that as payment of part of the purchase money, did not take the case out of the statute of frauds, so as to authorize the enforcement of a specific performance of the contract, the plaintiff would be remediless if the action could not be maintained.

The facts of this case are materially variant from that cited, and entirely distinguish it. Here the plaintiff not only took possession of the land, but continued to occupy it for three years, and up to the time of the trial. In *Meredith v. Naish*, [3 Stew. Rep. 207,] it was held, that where the purchaser of lands had paid a part of the purchase money and took possession under a parol contract, a specific performance might be coerced against the vendor, and the residue of the money recovered by him in an action at law. But independently of this decision, we are prepared to say, that the first instruction prayed should have been given. Morality forbids the idea that one man should take possession of another's property under a contract, which at most is *merely void*, and notwithstanding its continuous enjoyment, refuse to make for it any remuneration. Here the seller does not seek to recover of the purchaser upon his contract for payment, but the action is by the buyer, and assumes the utter invalidity of the contract, and asserts a right to be refunded what has been paid under it, although the purchaser's possession has never been molested, and the vendor has not refused to execute the contract. Such a demand is against equity and good conscience, and cannot be entertained.

It is needless to consider whether the last charge asked should have been given, as the action was not maintainable upon the proof.

The judgment is reversed and the cause remanded.

Remy, use, &c. v. Duffee.

REMY, USE, &C. V. DUFFEE.

1. Admissions of the owner of a note that it has been paid may be given in evidence in a suit brought for the use of another, it not appearing that he had any interest in the notes when the admissions were made.
2. A custom that the merchants of Mobile retain bills and notes paid by them for their country customers, until the end of the year for settlement, may be given in evidence.

ERROR to the County Court of Tuscaloosa.

This was an action of assumpsit by the plaintiff in error against Duffee & Healy, as makers of a promissory note for eighteen hundred and thirty-five dollars and forty-six cents, dated Mobile, 30th September, 1835, due five months after date, and payable to F. Cumming, and by him indorsed; and one for the same amount, dated 15th October, 1835, at four months.

Pending the suit Healy died, and the cause was continued against Duffee.

Upon the pleas of non-assumpsit, payment and set-off, the defendant obtained a verdict.

Upon the trial below, it appeared in evidence that Cumming & Remy formed their partnership in 1835, and that from that time until their dissolution in 1837, that firm and the firm of Duffee and Healy at Tuscaloosa, had large dealings together in mercantile transactions. That on the dissolution of the firm of Cumming & Remy, and death of the former, the papers of the firm fell into the hands of Remy. That in 1837, Cumming told the witness that Duffee & Healy had paid up all the claims they had against them, and that in 1838 Remy said that he held an account to the amount of sixteen hundred dollars against Duffee & Healy, which they had refused to pay, but that if they did not pay it he would sue them on two notes in his possession, which had been paid and not taken up. The plaintiff's counsel moved to exclude this testimony, but the Court refused to exclude it.

Remy, use, &c. v. Duffee.

The defendant also proved that it was customary among merchants in Mobile to retain in their possession notes and bills paid by them for persons up the country, for settlement at the end of the year. This evidence was also objected to, but the Court overruled the objection.

The Court charged the jury that if Cumming & Remy, whilst they were the owners of the notes in suit had acknowledged they were paid by the defendants, they must find for the defendants; that if the plaintiff was an innocent holder of the notes before maturity, they must find for the plaintiff—to which the plaintiff excepted, and now assigns the same for error.

J. J. PORTER, for plaintiff in error.

CRABB & COCHRAN, contra.

ORMOND, J.—The admissions of the plaintiff and his deceased partner, whilst owners of the notes here sued on, that they were discharged by payment by the defendant, is conclusive, without explanation or contradiction, against their right to recover in this action. These admissions lose none of their force because the suit is brought for the use of another, as it does not appear that he had any interest in the notes when the admissions were made.

Nor can we perceive any objection to the proof that it is the custom of the merchants of Mobile to retain the notes and bills of their country customers paid by them, until a settlement at the end of the year, the object of the proof being doubtless to account for the fact of the notes remaining in the hands of Cumming & Remy after they were paid.

We do not perceive any error in the judgment of the Court below, and it is therefore affirmed.

HOLLINGER v. SMITH.

1. When charges are requested and refused by the Court, and no evidence is stated in the bill of exceptions, connecting the charges with the case, they will be deemed abstract, and their correctness will not be reviewed.
2. The act for the relief of tenants in possession against dormant titles, [Dig. 652.] gives a cumulative remedy, and does not repeal the common law rule; therefore when the defendant in an action of trespass to try titles, is in possession, under color of title, and is not a mere trespassor, he is entitled to set off the value of the permanent improvements against the value of the use and occupation.
3. A plaintiff who recovers an erroneous judgment, cannot avoid the consequences of the error, by entering a release in this Court of the damages, in the ascertainment of which the error arose, and leave judgment for the land recovered.

WRIT of Error to the Circuit Court of Clark county.

Action of trespass to try title. Pleas—not guilty and *liberum tenementum*. Verdict and judgment for the plaintiff.

In the course of the trial the defendant gave in evidence, a document emanating from the General Land Office, in these words:

General Land Office, April 12th, 1820.

I certify that in pursuance of an act of Congress passed on the 3d March, 1817, entitled an act making provision for the location of the lands reserved by the first article of the treaty of the 9th August, 1814, between the United States and the Creek Nation, to certain Chiefs and Warriors of that Nation, and for other purposes, the Secretary of the Treasury has confirmed the claim of Peter Randon, being No. 22, and that the said Peter Randon is entitled to occupy the following lands, agreeably to the provisions of said act, viz: two fractions of section thirty-three, of township six and range five, on each side of the Alabama river, in the State of Alabama, and the district of Cahawba.

In testimony whereof I have hereunto subscribed my name, and caused to be affixed the seal of this office, at the city of Washington, this 12th day of May, 1820. JOSIAH MEIGS,

(SEAL, &c.)

Commissioner of the Gen'l Land Office.

The defendant also proved that he held under claim of title, derived from said Peter Randon.

No other evidence is stated in the bill of exceptions, nor does it otherwise appear what title was set up by either party to the lands in controversy.

The defendant requested the Court to charge the jury—

1. That the act of Congress of 1817, entitled, &c. does not provide for the reversion of the lands. That the United States have the right to grant lands by law, and in this case did grant the land in question, by the act of 1817, without imposing or insisting on the limitations and restrictions contained in the treaty of 9th August, 1814.

2. That under the said act it was necessary that some act should have been done by the United States to ascertain the fact of abandonment, before they would have the right to make a new grant.

3. That in arriving at the measure of damages, the jury should consider the permanent improvements proved to have been made by the defendant, upon the premises sued for, he holding according to the proof, under color of title.

4. That if the plaintiff laid his float upon the land with a knowledge that the persons then in possession, held under a grant from the United States, and held adversely to the United States and all the world, then his laying such float was fraudulent and void, although he might have believed the grant under which those then in possession held, was not a perfect one, and that the conditions of the grant had failed.

These charges were severally refused. The Court charged the jury that the plaintiff was entitled to recover as damages the value of the rents as proved, without regard to any improvements made by the defendant, the latter having made no suggestion before the trial under the statute.

The defendant excepted to the refusals to give the charges requested and to the charge given, and now assigns the same as matters of error.

PECK, for the plaintiff in error.

DARGAN and PEARSON, contra.

GOLDTHWAITE, J.—This case was argued chiefly upon its supposed connection with the treaty made with the Creek Indians, in 1814, and the act of Congress of the 3d March, 1817, by which the United States complied with their engagements to the Indians, as stipulated in the first article of the treaty.

The treaty contemplates no other reservations of land than to the Chiefs and Warriors of the tribe, and then only upon the condition that they and their descendants shall continue to occupy the reservations. The act goes much beyond the treaty, and after providing for the reservations of land by the Chiefs and Warriors, permits these lands to descend to the heirs in fee simple whenever the ancestor continues in the occupation until the term of his death. It also provides for three other distinct classes of reservations to the children or descendants of those who were killed in the service of the United States, or who have died since the treaty, or who are the heads of families, but not Chiefs or Warriors. In one or more of these classes the title provided for is a fee simple.

The mere inspection of the certificate which the defendant gave in evidence does not enable us to determine to which class the reservation belongs under the act of Congress, and all the charges requested with reference to the title itself must be considered as abstract, because no evidence is disclosed as having been before the jury from which any conclusion can be drawn of the incorrectness of the instructions.

In this condition of the case we have no means to ascertain what was the title of either party, and consequently no revision can now be had of the charges so far as they seem to affect the title.

2. But the affirmative charge with respect to the improvements made by the defendant, and his right to have them considered in the ascertainment of the damages to be recovered against him, enables us to review this point in the case, although the evidence is not set out with that precision which is always desirable. It is evident from what is stated in the bill of exceptions, that the defendant was not a mere trespasser, but that he held under Randon, by some claim of title derived from him; and in the third request for a particular charge it is said permanent improvements were proved to have been made

by the defendant, he holding under color of title. The Circuit Court excluded all consideration of these improvements from the jury, and instructed them that the plaintiff was entitled to recover the value of the rents proved, inasmuch as the defendant had made no suggestion of such improvements before the trial. This charge assumes to be predicated on the act of 1836, [Digest, 652,] which provides, that in any suit thereafter to be commenced, for the possession of lands or tenements, it shall be lawful for the defendant, at any time before the trial of such suit, to suggest to the Court, that he and those persons whose estate he has in the lands or tenements sued for, have had adverse possession of the same for three years next before the commencement of such suit, and that he and those persons whose estate he has, have made permanent and valuable improvements on the lands sued for, during the time he and they have had adverse possession of the same.

The act then proceeds to declare that the value of these improvements shall be set off against the value of the use and occupation, and if they are greater, no writ of possession shall issue for one year, unless the excess shall be paid into Court for the defendant.

This enactment provides a cumulative remedy, and does not take away any rights which defendants had by the common law to set off the value of improvements, in mitigation of the damages in an action of trespass for mesne profits. That action has always been considered as governed by equitable rules, and when the owner of land has been benefitted by permanent improvements, adding to its value, there is no reason why he should also be compensated in damages, especially when the action is against one who is in under color of title, and is not a mere trespasser. The law was so held in the case of *Jackson v. Loomis*, [4 Cowen, 168,] and it seems to be applicable to the case now under consideration, as it is clear that this defendant was not a mere trespasser. The Circuit Court certainly erred in considering the statute as taking away the right of the defendant to give evidence of permanent improvements of the land in mitigation of damages, and in ruling that the jury could not consider such improvements in ascertaining the sum to be awarded to the plaintiff as damages, and for this the judgment must be reversed.

Everly v. Bradford.

The defendant in error has offered to remit his damages for the purpose of avoiding another trial, but we think this cannot be done, as our jurisdiction over the case ceases with its reversal, and we are not invested with the discretionary power to allow of such amendment. When the judgment is reversed there is nothing for such a release to operate upon, because the judgment is declared null. The release cannot be entered before the reversal, for the reason that no such power is vested in this Court, and by such a course the parties in a great number of cases would avoid the consequences of erroneous proceedings, to the prejudice of those against whom they were committed.

Judgment reversed and remanded.

EVERLY v. BRADFORD.

1. It is competent for a merchant to establish an account by proof that the entry on his book is in the handwriting of a deceased clerk, who is proved to have been correct and accurate in making his charges; and where a deposition professes to set out an exact copy of the entry, as thus, "500 doz. cnt glass beads, a 30 cts. \$100," it is evidence to show that at least one hundred dollars was due for the articles charged; the plaintiff claiming only that sum by his declaration, the fair inference is, that the sale was made at twenty cents the dozen, and the mistake was made by the commissioner or scrivener who wrote the deposition.

WRIT of Error to the Circuit Court of Talladega.

This was an action of assumpsit, brought in the County Court of Talladega, by the plaintiff in error, to recover the sum of one hundred dollars for goods, wares and merchandize sold and delivered. On the trial the plaintiff excepted to the ruling of the presiding Judge. From the bill of exceptions it appears that the respective partnerships of the plaintiff and defendant with their deceased partners, at the date of the ac-

Everly v. Bradford.

count in question, was proved; and the plaintiff offered the deposition of a witness, who stated, that in the year 1834, he was in the employ of the plaintiff and his deceased partner, who were doing business in the city of Philadelphia. At that time Benj. W. Butler was a Clerk in the house, and has since died. Witness further states that he was well acquainted with Butler's handwriting, from having frequently seen him write, that he had a book of original entries of the plaintiff's house then before him, in which, in the handwriting of Butler, was an entry under date the 9th October, 1834, as follows: "Sold Bradford & Harris, of Wetumpka, Ala. 500 dozen cut glass beads *a* 30 cts." carried out \$100. Witness further states that he was well acquainted with Butler, and believes him to have been an honest man and a correct clerk; that the entry stated, he believes was made on the day it bears date, and that the entries in the books of the plaintiff's house, from his personal knowledge, were made with punctuality, care and accuracy. The defendant is sued as the surviving partner of Temple Harris, with whom he did business under the style of Bradford & Harris.

The plaintiff, by his counsel, moved the Court to charge the jury, "that if they believed from the evidence, that the charge in the account sued on, was made in plaintiff's books of account, in the ordinary course of business, by a clerk of plaintiffs who was dead at the time of taking the deposition read to them, that he was a correct clerk, and that plaintiff kept correct books of account; and there being no evidence to disprove the plaintiff's account, they should find for him—which charge the Court refused to give.

The jury found a verdict for the defendant, and the plaintiff prosecuted a writ of error to the Circuit Court, where the judgment of the County Court was affirmed, and to revise this latter judgment a writ of error has been sued to this Court.

L. E. PARSONS, for the plaintiff, insisted that the Judge of the County Court should have instructed the jury as prayed, and cited 2 Starkie's Ev. 639; 15 East Rep. 32; 2 Ld. Raym. Rep. 873; 2 Salk. Rep. 690; 9 Porter's Rep. 289.

CHILTON, for the defendant. The charge prayed was upon

Everly v. Bradford.

the facts, and was properly refused. The deposition, while it affirms the accuracy of the entry, shows it in point of fact to be incorrect; for instead of being carried out for \$100, it should according to the *data*, have been \$150.

COLLIER, C. J.—It is conceded that where a clerk who has made entries in the books of his employer is dead, proof of his handwriting is admissible to show, not only that the entries were made as they appear, but also that they are correct. *Clemens v. Patton, Donegan & Co.* [9 Porter's Rep. 289,] is directly to the point. But it is insisted that the instruction asked to be given to the jury, not only asserts the admissibility of the evidence, but its legal conclusiveness. This argument we think cannot be maintained. We understand from the bill of exceptions that no evidence was offered by the defendant, at the trial, so that the cause was submitted to the jury on the proof adduced by the plaintiff alone; this appears from the statement that there was "no evidence to disprove plaintiff's account." Now the case cited affirms that the evidence was *prima facie* sufficient to establish the account; this being the case, upon principle, it would seem, the jury were bound to accord to it credence. The Court were requested thus to declare the law in effect.

It is true that the jury are to judge of the credibility of witnesses, but there was nothing in the deposition before them to discredit it, or cast the slightest shade of suspicion over the witness. The entry made by the deceased clerk, supposing the beads to have been sold at thirty cents the dozen, was incorrectly carried out; but this should be intended to be a mistake of the commissioner who took the deposition, or of the scrivener who wrote it. And the fact that the plaintiff declares for one hundred dollars only, shows that the charge should have been twenty cents the dozen. If the facts were submitted to a Court as a case agreed, or as a special verdict, there could be no hesitancy as to the proper judgment, and we cannot doubt the correctness of the instruction prayed.

The judgments rendered, both by the County and Circuit Courts are reversed, and the cause remanded to the Circuit Court, that it may be thence remanded to the County Court.

GAZZAM v. POYNTZ.

1. A deed of assignment made by a debtor conveying his property to a trustee, with power to collect and sell and apply the proceeds to the payment of certain creditors, first, those named in schedule B. according to the order in which they were set down ; second, those enumerated in schedule C. *pari passu*, and without priority or partiality, and lastly all other persons having legal demands against the debtor—and also giving to the trustee the power and discretion of departing from such order and enumeration, if by such departure any compromise or settlement could be effected, advantageous to the debtor or his creditors—declared void, because made with the intent to delay, hinder and defraud creditors—and that such intent was apparent on the deed.
2. A deed of assignment can be sustained, only where the property conveyed by the deed is *bona fide* devoted to the payment of the creditors, without stipulating for any benefit to the debtor, and where the equitable interests of the creditors are fixed and determined by the assignment itself.

ERROR to the Chancery Court of Mobile.

This was a bill in Chancery, filed by the defendants in error to set aside a deed of assignment made by Audley H. Gazzam.

The complainants alledge that they are judgment creditors of A. H. Gazzam, having obtained judgment against him for \$7,568, besides costs—that an execution issued thereon to the sheriff of Mobile county, which he returned no property found. That another execution has issued and been levied on certain lands of A. H. Gazzam, sufficient in value to satisfy the judgments—that Gazzam, with the view of delaying and hindering his creditors, on the 4th January, 1840, made a deed of assignment to one Charles W. Gazzam, his brother, including the lands so levied on, who has pretended to manage and control them, but has held them in fact for the sole use and benefit of his brother—that the trustee has not offered the property for sale under the powers in the deed, nor has he gone on to close the affairs of the trust, but has used the estate and interest for the sole purpose of preventing the creditors of A. H. Gazzam from collecting their debts by due course of law.

The bill further charges that the trustee, from time to time, has conveyed large tracts of land, although the special trust and preferences have not been performed—that he has made divers settlements with the creditors of Audley, giving them in payment lands embraced in the deed, although their claims are not set forth in the same, nor had they obtained any judgment, or acquired any *lien* thereon—that this was done by the counsel and with the advice of Audley, and because exorbitant prices were obtained for the lands—and that the trustee refuses to settle any debts unless for lands at such prices.

The bill also charges a secret trust to exist between the trustee and his brother, and that the former allows the latter a support and maintenance out of the trust property, and permits him, without rent, to occupy the dwelling house, &c. That all the property of Audley is conveyed by the deed which is exhibited. and prays that the same be declared fraudulent and void, and that the property be held subject to the payment of the judgment, &c.

The deed of assignment conveys to the trustee a large amount of real and personal property, debts, &c. “upon the trust that with all speed convenient and compatible with the interest and security of all parties beneficially interested, to sell, dispose of and convey, all the real and personal estate and property hereby conveyed and assigned, or such part and parcel or portion thereof as may be necessary, at such prices and on such terms and conditions as the said party of the second part, his heirs, &c. may deem most expedient, and to collect in the discretion of the said party of the second part, the said debts or sums of money, and all other the premises hereby assigned—and out of the trust moneys which shall come into his hands, in the first place reimburse himself all costs, charges and expenses whatsoever, which he may sustain or be put to in and about the execution of the trust hereby reposed in him, or otherwise relating thereto—and, in the second place, out of the residue of the said trust monies, as the same may be from time to time collected, to pay and satisfy the several notes and evidences of debt set down and enumerated in schedule of my debts hereto annexed, marked B. paying, satisfying and discharging the same in the precise order in which they are herein set down and numbered, not meaning, however, hereby to

deprive my said assignee, the said party of the second part, of the power and discretion of departing from the said order and enumeration, if by such departure any compromise or settlement may be effected advantageous to the interest of the said party of the first part and his creditors—and in like manner, and at the same time to pay and satisfy any interest that has, or may, accrue on said notes at the payment thereof—and in the third place, out of the residue of the said trust monies, after the aforementioned payment of principal and interest, to pay and satisfy, as far as the said residue may suffice, *pari passu*, and without partiality, preference or priority, the several debts set down and enumerated in schedule C. hereto annexed—and in the fourth place, out of the said trust monies, after the payment of the debts last mentioned and enumerated in schedule C. to pay and satisfy, as far as the residue may suffice, all other debts, demands and responsibilities, legally enforceable against me, the said party of the first part. Provided, nevertheless, and it is hereby declared and agreed, that the said party of the second part, may use and employ such agents as he may think proper, &c.—and it is further declared to be the meaning and intention of these presents, that notwithstanding any thing which may be herein declared or appointed, he, the said party of the second part may, in his discretion, pay as it shall become necessary and convenient any interest or curtailments accrued, accruing or to accrue on any note or notes of the said party of the first part, enumerated in this assignment by the schedule annexed, due in any Bank or Banks, on any renewal thereof; and further, that the said party of the second part, may, from time to time, and whenever it shall be for the mutual interest of the several parties beneficially interested, to depart from the order of assignment hereinbefore appointed and directed, by settling in full or in part, by compromise or otherwise, any of the debts or liabilities specified in the schedule hereto annexed and for which I am legally liable and chargeable.”

The several schedules are annexed of debts due to and from A. H. Gazzam, the latter amounting to between fifty-five and sixty thousand dollars.

Audley H. Gazzam denies all fraudulent design in making the deed, but that the intention was to provide *bona fide* for all his creditors—that the proviso in the deed authorizing the

trustee to depart from the order in which the claims were enumerated in the schedule, was designed to enable the trustee to preserve the estate, as in cases where debts secured by mortgage on real estate, which would not bring its value if sold under a decree of foreclosure and that the power was not intended to defeat the rights of any of the creditors. The other charges in the bill impugning the fairness of the deed or the conduct of the trustee are all denied. He also denies that he has been supported by or has received any thing from the trustee since his acceptance of the trust.

C. W. Gazzam, the trustee, denies that the deed was made to delay or defraud creditors, within his knowledge or belief, but the intention was to pay all the debts of A. H. Gazzam, and that all his acts under the deed have been to accomplish that object. That from the date of the deed up to the present time he has constantly offered the property for sale, and has done his utmost to dispose of it as quickly and to the best interest of all parties concerned, as possible. He denies that he has used the property in such a manner as to defeat the just rights of creditors. That for the last four or five years, real estate, of which the assigned property principally consists, has had at public auction, or at forced sales, little or no value, and that if he had offered the estate in large bodies, at public sale, so as to satisfy, as far as might be, the debts recited in the assignment he believes the entire assigned debt would not have satisfied one-fourth of the claims. That to preserve the estate to the creditors he has paid large sums in discharge of mortgages. He denies having conveyed large parcels of land in disregard of the preferences created by the deed, and whether the powers vested in him by the deed authorized him to make such preferences, he submits to the Court. He denies that he has made settlements with the creditors by giving them lands at exorbitant prices, and has made but two offers of this description, one of which to complainants, and the price put on the land was what he truly believed to be its value, and lower than the adjacent lands were held at, and that the offer was made at the suggestion of the complainant's solicitors. He thinks the assigned property, under judicious management, will pay all the debts, but if the estate is wound up suddenly and hastily, it will be largely insolvent—that he has proceeded

with the sales with as much despatch as is consistent with the interest of the creditors—he denies all fraud or collusion with the maker of the deed, and renders a full account of his acts under the deed.

The parties went to trial by consent on bill and answer, and the Chancellor declared the deed fraudulent, and granted the relief sought by the bill. From this decree this writ of error is prosecuted.

DUNN & LESESNE and DARGAN, for plaintiffs in error contended that the intent of the deed was honest, and that the powers contained in it could not be exercised to a dishonest purpose without violating the terms of the deed, and that this is the only criterion. [4 Mason, 220; 14 Johns. 458; 9 Porter, 571; 5 Pickering, 32; 2 Conn. 633; 13 Conn. 391; 6 Greenleaf, 395.]

That the cases relied on by the other side, from 7th Paige, 570, and 11th Wendell, 240, were not applicable to this case, but if so considered, they maintained they were not correctly decided, and were in hostility with the cases cited from 5th Pick. and 2d Conn.

CAMPBELL, contra. Neither the detail of explanatory circumstances nor the denial of fraud in the answer, will relieve the parties to an assignment, which contains illegal provisions, when assailed by the dissenting creditors. [1 Ed. Ch. 256; 11 Wendell S. C. 240]

The assignment in this case places the property of the debtor in the hands of a third person, giving to him the privilege of retaining it for an indefinite period, to enable him to compound with the creditors of the assignor. Under the powers conferred by this deed, the assignee can set at defiance the creditors of the grantor. He must be allowed to fulfill the trusts, and unless the control and disposition is allowed to him he cannot do so. Hence law and chancery must both await his decision. A law giver is constituted by the act of the debtor more powerful than the supreme power of the State, and the right of the creditor to satisfaction out of the debtor's property postponed indefinitely. [11 Wend. 200; 14 Johns. 258; 4 Paige 24;

1 Iredell, 490; 12 S. & R. 198; 1 Iredell, 180; 7 Paige, 568.]

The cases cited from Connecticut are unsound. A debtor has no right to place his property in such a situation that it can be used for any purpose but to pay his debts. They have a claim to his property unconditionally, and in the state in which it is at the date of the assignment. To make such a stipulation good, the creditor must assent to it. [31 Eng. C. L. R. 254.]

ORMOND, J.—In the case of Ashurst v. Martin, [9 Porter 566,] we sustained an assignment made by one in failing circumstances, by the terms of which a release was exacted from all the creditors who came in under the deed within a time stipulated. That decision was reluctantly made, under the influence of a former decision of this Court, which had been long acquiesced in, but we then avowed our determination not to go beyond the letter of that case. It was then considered as settled law, “that a debtor may convey his property in trust to pay one or more creditors in full, or to pay his creditors in unequal portions, provided he relinquishes all control over it, and stipulates for no pecuniary benefit to himself, but fairly and *bona fide* appropriates it to the payment of his debts.” Such is still our opinion, and to that test we will subject the assignment in this case.

The parties having gone to trial on bill and answer by consent, the latter, according to the rule adopted by this Court for the regulation of proceedings in the Courts of Chancery, must be considered as true in all its parts; and as the answers of both defendants deny all intentional fraud, and insist that those portions of the deed of assignment now objected to were introduced in it for the sole purpose of enabling the trustee, by a judicious sale of the property, to pay all the creditors, the question is one of dry law, upon the construction of the deed.

The property conveyed by the deed consists of choses in action and other personal property, lands in the city of Mobile, and a large amount of land situated in other counties, which was wild or unimproved, and which the trustee was authorized with all speed, convenient and compatible with the interest of all parties beneficially interested therein, to sell, dispose of

and convey at such prices and on such terms or conditions as he should deem expedient and with the proceeds and the debts collected, after paying expenses, &c. to discharge the debts enumerated in schedule B. in the precise order in which they are there enumerated, giving to the trustee a discretion to depart from the order of enumeration, "*if by such departure any compromise or settlement may be effected advantageous to the interest of the party of the first part and his creditors.*" The second class of creditors enumerated in schedule C. are to be paid *pari passu*; and lastly, all other legal demands. The power of the trustee is finally stated thus: "And further, that the said party of the second part may from time to time, and whenever it shall be for the mutual interest of the several parties beneficially interested herein, depart from the order of payment hereinbefore appointed and directed, by settling in full, or in part, by compromise or otherwise, any of the debts or liabilities specified in the schedule hereto annexed, or for which I am legally liable and chargeable."

We are of opinion with the Chancellor, that this deed cannot be supported—that there is an intent apparent on its face that it was made with the design to hinder and delay creditors in the collection of their debts.

A deed of assignment, to be valid, must distinctly declare the uses; and one reserving to the grantor the right to declare them subsequently, would be void. The reason of this is apparent. Whilst the debtor retains his property in his hands, subject to the legal pursuit of his creditors, he may compound with them and obtain an abatement of their claims. The parties meet on equal ground, and the creditor may either assent to the debtor's proposition or take his chance by suit. But if the debtor could, by an assignment, place his property beyond the reach of his creditors, by suit, and be at the same time permitted to compromise with them, or offer terms of compromise, the odds would be fearfully in his favor. The making of an assignment with preferences, is an admission on the part of the debtor, of inability to pay all his debts, or at least renders such payment doubtful; and those who are placed in the class of those who are to be paid *pari passu*, the true meaning of which generally proves to be not to be paid at all, naturally feel alarmed for the safety of their debts, and if the debtor

through his trustee, who is a person usually not very hostile to his interests, can appeal to their fears and offer them the certainty of receiving a portion of their debt instead of the doubtful-provision made for them in the deed for any portion of it, he would be enabled to exercise a control over them which few could resist. Even the preference given to some of the creditors would be an illusion, and they would be merely placed on the preferred list to hold out inducements to those whose chance of payment, from the position assigned them, being doubtful, if not desperate, to abate something of their demands, and thus make it, in the language of the deed, "advantageous to the interest of the *party of the first part* and his creditors, that a compromise or settlement should be effected." Such a provision, if tolerated, would enable a debtor to set his creditors at defiance, and compel them to bid against each other for his favors, and would be virtually vesting him with powers which no one would suppose he could in terms reserve to himself in the deed of assignment.

In the impressive language of Judge Gaston, in *Haffner v. Irwin*, [1 Iredell, 490,] "It is enough, perhaps more than enough, for human infirmity, that the debtor shall be allowed, under these distressing circumstances, to select, according to his unbribed judgment, among his creditors for those who merit a preference, and to make a simple and unconditional appropriation of his property to the payment of their claims. But to allow him to negotiate for terms with them—to seek out those who will be most favorable to him, either in the way of profit or commerce, direct or indirect—to stipulate openly or covertly with regard to the property conveyed, other than its appropriation to the purposes of the conveyance—would be injurious to the best interests of the community."

In the case of *Barnum v. Hampstead*, [7th Paige, 568,] which was an assignment by a debtor giving preference to some of his creditors, but giving to the trustee a *discretion* to discharge certain claims against the assignor in preference to the preferred debts.

The Chancellor held that this provision rendered the deed void, upon the ground that an assignment which places any of the creditors in the power of the debtor, or his assignee, must

have the effect to delay or hinder creditors in the collection of their debts. [See also the opinion of Mr. J. Sutherland, in *Grover v. Wakeman*, 11 Wendell; 203.]

We have been referred particularly to the case of *De Forest v. Bacon*, [2 Conn. 633,] as supporting the view taken by the counsel for the plaintiff in error. By the deed in that case, the trustees were empowered to continue a manufactory till certain raw materials were worked up, and to purchase any necessary articles for that purpose. The Court held this provision did not *per se* render the conveyance void. We are not now called on to say what discretion may be vested in the trustee in the use or sale of the property—our concern at this time is with the *avails* of the property when sold, and whether the trustee can be invested with a discretionary power over it. So in the case of *Ashurst v. Martin*, [9th Porter, 576,] we held that it did not invalidate the deed because the trustee was invested with a discretionary power as to the mode and manner of settling the trust property. But that question is totally distinct from the present inquiry.

As stated in the preceding part of this opinion, an assignment by a debtor can only be sustained where the property conveyed by the deed is, by its terms, fairly and *bona fide* devoted to the payment of the creditors, without stipulating for any benefit to the debtor, and where the equitable interest of the creditors are fixed and determined by the assignment itself. We have attempted to show that the assignment in this case is not of that character. In its results, so far is it from devoting the assigned property to the payment of the creditors, and creating in their favour direct and absolute equitable interests, that no certain interests vests in any creditor; but every thing as it regards priority of payment is referred to the discretion of the trustee, who is distinctly admonished in the deed itself to have regard in his settlements and compromises to the interest of "*the party of the first part.*" Such a conveyance is in open hostility with the statute of frauds; its direct and necessary tendency is to hinder and delay creditors of their just and lawful actions, and is therefore fraudulent and void—the *intention* being apparent in the deed itself.

We are fully satisfied that the conclusion here attained, is in

McMichael and Shackelford v. Rapelye and Purdy.

accordance with established principle, as ascertained by the adjudged cases, and that the decision is demanded by the best interests of the community.

Let the decree of the Chancellor be affirmed.

McMICHAEL AND SHACKLEFORD v. RAPELYE AND
PURDY.

1. The condition of a prison bounds bond is forfeited, if the prisoner, at the expiration of sixty days after the execution of the bond, remains without the walls of the prison, he not having taken the benefit of the act for the relief of insolvent debtors.

WRIT of Error to the Circuit Court of Autauga.

This is an action of debt on a prison bounds bond, conditioned that McMichael should continue a true prisoner within the custody and keeping of the keeper of the said prison, (the jail of Autauga county,) or of his steward, deputy or other officer, or some of them, within the limits of the prison bounds, as by law established, until he should be discharged by due course of law, without committing any escape in the mean time. The second breach assigned in the declaration is, that McMichael neglected to take the benefit of the act for the relief of insolvent debtors for more than sixty days after executing the bond, and after that time continued to have the liberty of the bounds of said prison, as by law established, from which a forfeiture of the condition is alledged. The defendants demurred to this breach, and judgment was rendered for the plaintiffs.

This judgment upon the demurrer is the only error now insisted on.

LAPSLEY, for the plaintiffs in error.

GEO. GOLDTHWAITE, contra.

McMichael and Shackleford v. Rapelye and Purdy.

GOLDTHWAITE, J.—The only question here presented is with respect to the sufficiency of the breach assigned, and its solution involves an examination of several of our statutes authorizing the discharge from actual custody of such individuals as are arrested by writs of *ca. sa.* The second section of the act of 1824, imposed the duty on the Judges of the several County Courts, with the Commissioners of Roads and Revenue of each county, to lay out the bounds and rules of their respective prisons—not exceeding one mile from the jail. The third section of the same act provides that any prisoner imprisoned, as mentioned in the second section, may enter into bond with sufficient surety to the plaintiff, in double the sum of the debt or damages for which he may be imprisoned, conditioned, &c. [Digest, 351, §1, 2. The act of 1837 repealed so much of the act of 1824, as required the Judges, &c. to mark and lay off the bounds of prisoners, and extended the prison bounds to the limits of the county within which prisoners confined were to be restricted upon entering into the same bond as then required by law. [Meek's Sup. 307.]

The first section of the act of 1821 provides the mode by which any person who is taken on mesne process, or in actual custody, or charged in execution, may be discharged from arrest or imprisonment, for the purpose of taking the benefit of the insolvent law.

This is effected by giving bond with surety conditioned that the debtor will appear and make surrender in such manner as is required by law, of his property or effects, for the benefit of his creditors, &c. And the fourth section of the same act provides that no person in custody shall have the liberty of the prison bounds, who shall neglect or refuse for sixty days, to take the benefit of the act. [Dig. 228-9, §9, 12.]

This bond was executed in April, 1838, and the inquiry is, whether the neglect to take the benefit of the act for the relief of insolvent debtors, is a breach of the condition, when the prisoner continues to have the liberty of the bounds for a longer period than sixty days.

By the giving of the bond the prisoner is not discharged from custody, but is as much within confinement as if enclosed within the walls of the jail, because the stipulation of the bond

Fortune v. The State Bank.

is that he will continue in the custody of the keeper of the jail, his steward, deputy or other officer within the prison bounds *as by law established*. For the space of sixty days these bounds extend to the limits of the county; but after that period they were restricted to the walls of the jail; it is therefore just as much an escape to remain out of the jail, after the expiration of sixty days, as it would be within that time to withdraw from the county.

The allegation of the breach is, that the prisoner neglected for the space of sixty days to take the benefit of the act referred to, and after the expiration of that time continued to have the liberty of the prison bounds as by law established. We think this must be intended to mean, that he continued to remain without the walls of the jail, within the county, for it would be absurd to intend the allegation to mean that the prisoner remained within the jail, because in such event the allegation of an escape would be untrue.

Our conclusion is that the breach is sufficiently assigned, and therefore the judgment is affirmed.

FORTUNE v. THE STATE BANK.

1. The answer of a garnishee making a special statement of facts, from which it is inferrable that he was once indebted to the defendant in attachment, but that he has been notified by a third person that he is the proprietor of the debt and demands payment, does not authorize the rendition of a judgment against the garnishee. But in such case the plaintiff may contest the answer, and submit an issue to the jury.
2. Where the answer of a garnishee states that a third person sets up a claim to the debt admitted to be owing, the act of 1840 requires a notice to be given to that person; and it seems that two notices returned "not found," are equivalent to personal service, so that the statute applies even where he resides without the State.
3. A garnishee who has answered and admitted an indebtedness to the defendant or some one else equal to the amount of the recovery against him, may, notwithstanding, sue out a writ of error.

Fortune v. The State Bank.

4. Where the judgment recites that the garnishee had answered at the last term that he was indebted to the defendant, &c., and an answer is copied in the transcript which appears to have been then verified, that answer will be considered by the appellate Court as a part of the record.

WRIT of Error to the County Court of Tuscaloosa.

The defendant in error having sued out an attachment against the estate of Thomas Amis, caused a garnishment to be served on the plaintiff, requiring him to state on oath what he was indebted, &c. to the defendant in attachment. The garnishee appeared and answered that in the spring of 1840, he was indebted to Junius Amis in the sum of four thousand dollars, he then paid about one thousand dollars, and Junius informed him that he should give the control of the balance to Thomas Amis, to be used by him for his own purposes; that at the time the payment was made, his notes were in the hands of R. B. Waller for collection, but without suit; that the notes still continued in the hands of Waller until June, 1840, when garnishee made another payment to him of some eight hundred or one thousand dollars, which Waller informed affiant he paid to Thomas Amis, who admitted to affiant he had received it. Garnishee distinctly understood from Junius that he had parted with all his property in the notes to Thomas Amis, and his object was to enable him to pay his debts with the proceeds. Since that time, in the spring of 1841, and since the garnishee was summoned, Junius applied to him for the payment of the balance due on the notes; that garnishee refused to pay the same upon the ground that process of garnishment had been served on him in this case. Junius then claimed the debt as his own, and garnishee being informed that one thousand dollars would pay the amount sought to be recovered of Thomas Amis, then paid Junius one thousand dollars. There is still due from garnishee one thousand dollars, which, until the interview with Junius as related, he had supposed was owing to Thomas Amis.

The bank recovered a judgment against the defendant in attachment for four hundred and ninety-two 50-100 dollars, debt, &c. and twenty dollars and fifty cents costs; and thereupon a judgment for the like sum was rendered against the plain-

Fortune v. The State Bank.

tiff in error, as a garnishee. To revise the latter judgment a writ of error has been sued to this Court.

PECK & CLARK, for the plaintiff in error.

B. F. PORTER, with whom was CRABB & WM. COCHRAN, for the defendant.

COLLIER, C. J.—It has been repeatedly decided by this Court, to authorize a judgment against a garnishee, his answer must contain a distinct admission of a debt due or to become due to the defendant in the principal cause. [Allen v. Morgan, 1 Stew. Rep. 9; Presnall v. Mabry, 3 Porter's Rep. 105; Smith v. Chapman, 6 id. 365; Stubblefield v. Hagerty, 1 Ala. Rep. 38; Mims v. Parker & Coffman, id. 421; Foster, Nostrand & Co. v. Walker, 2 Ala. Rep. 177.] In the case at bar the answer of the garnishee does not admit that he owes the defendant any thing, but it is a mere admission that he is indebted in a sum greater than that sought to be recovered by the plaintiff in attachment, and that the notes evidencing his indebtedness were once under the control of the defendant, and he supposed him to be their proprietor, but he has learned since, from Junius Amis, to whom they are payable, that they are his property. This answer does not subject the garnishee to a judgment; he has stated with particularity the facts to which he was required to answer, and could not be required to determine to whom he is a debtor. [Foster, Nostrand & Co. v. Walker, 2 Ala. Rep. 177.] The case of Baker v. Moody, [1 Ala. Rep. 315,] is unlike the present. There the garnishee answered that he had in his possession a sum of money belonging to the defendant in attachment, but which he was informed by him was to be paid over to another person, but that person had given no notice of any claim to it; it was held that if the third person had given notice to the garnishee of his claim to the money, no judgment could have been rendered upon an answer disclosing that fact; but this not appearing, the answer must be regarded in effect as the admission of an indebtedness to the defendant.

If the plaintiff desired to proceed further against the garnishee, the remedy was a plain one, he might have contested the answer and thus submitted the question in controversy to a

jury. The act of 1840, "to amend the law in relation to garnishments," requires a notice to be given to a person who is shown by the answer to set up a claim to the debt or property in respect to which the garnishment issued, by virtue of an assignment or transfer. This statute is beneficial in its provisions, and should receive a liberal construction, and being thus interpreted, might be held to embrace the case stated by the garnishee. There can be no difficulty in proceeding under it, although the person claiming the debt may reside without the State; in such case, we, (as in analogous cases,) would be inclined to hold, that the return of two notices not executed, was equivalent to a personal service.

It has been argued that as the garnishee submitted to answer, and shows that he is indebted even beyond the amount of the judgment against him, that he should not now be heard to insist on error, that, that judgment is erroneous. This argument cannot be maintained. It has been often held that a garnishee may prosecute a writ of error, and show that the judgment should not have been rendered against him, even where his answer discloses an indebtedness to the defendant, or some one who claims the debt through the defendant. And in one case at least, it was considered necessary to the garnishee's protection that he should not submit to an erroneous judgment. [Colvin v. Rich, 3 Por. Rep. 175.] The more especially is this decision applicable, where the garnishee is urged, by the person claiming the debt, to sue a writ of error.

It was suggested, that the answer of the garnishee sent up with the transcript, is no part of the record, and to entitle it to be thus considered, it should have been embodied in a bill of exceptions. This point was made in *Stubblefield v. Hagerty*, [1 Ala. Rep. 38.] In that case the judgment recited that the garnishee had filed his answer, and that the plaintiff had consented to receive it; and this was held sufficient to authorize this Court to regard it as the basis of the judgment of the County Court. In the case before us, the judgment states "that the said John A. Fortune had answered at the last term of this Court, that he was indebted to the said Thomas Amis the sum of one thousand dollars," &c. Upon looking into the answer, we discover that it was verified at the time recited in the judgment; and as the garnishee's answer must have been re-

duced to writing, having been made at the term preceding the judgment, it will be intended that the paper found in the transcript is that on which the court acted.

This view of the case is decisive to show, that the judgment of the County Court must be reversed and the cause remanded.

RANDOLPH v. PECK & Co.

1. A judgment rendered by default against a garnishee on the third day of the term to which he is summoned, is erroneous and will be reversed on error.

ERROR to the County Court of Greene.

J. J. PORTER, for plaintiff in error.

ERWIN, contra.

ORMOND, J.—This was a proceeding in the Court below commenced by the defendants in error, plaintiffs in a judgment against Thomas B. Archer, by process of garnishment against the plaintiff in error, upon which they obtained judgment against him by default, for failing to appear and answer, which was afterwards confirmed and final judgment rendered.

The assignments of error present several grounds for reversal, but it is only necessary to examine one which is decisive of this case. The plaintiff in error was summoned as a garnishee, to appear within the first four days of the term of the County Court of Greene county, to be held on the fourth Monday in May, 1839. The record shows that on the 29th of May, which was Wednesday, the third day of the term, a conditional judgment was rendered against the garnishee, for failing to appear and answer, which judgment was afterwards made final.

Puckett v. Bates.

The statute, [Aik. Dig. 12, §19,] allows to the garnishee the first four days of the term to appear and answer, and upon his failing so to appear and answer, authorizes the rendition of a conditional judgment against him. The judgment in this case being rendered before the time had elapsed, within which the garnishee could appear and answer, is void, and for this error the judgment must be reversed and the cause remanded.

PUCKETT v. BATES.

1. Where B. contracts with K. to build a house for such price as was customary, and proceeded with the work, and afterwards K. left the State, whereupon P. promised verbally to pay B. according to the contract if he would go on, and finish the work; this promise is collateral, and cannot be enforced under the statute of frauds. *Quere*, as to how the law would be if the contract between B. and K. was repudiated before the promise by P.

WRIT of Error to the Circuit Court of Sumter County.

Bates declared against Puckett on the common counts for work and labor, and for materials furnished in erecting a house. A verdict was found as upon issue joined, and judgment rendered thereon for the plaintiff.

The defendant had a bill of exceptions sealed at the trial, which discloses the following facts. Bates had contracted with one Kelly, to build a house for Kelly in Payneville, in Sumter county, for which Kelly agreed to pay as much as the house should be worth at the rate of charges usual in said county. Bates commenced the work, and while it was progressing, and before its completion, Kelly left the State and went to Louisiana. After Kelly left the State, Puckett promised verbally to Bates, if he would go on to do the work as he had engaged with Kelly to do it, he, Puckett, would pay him therefor.

On this evidence the defendant asked the Court to charge

Puckett v. Bates.

the jury, that if they believed the plaintiff contracted originally only with Kelly, then the defendant was not liable unless his promise to the plaintiff was in writing. This charge was refused and the jury were instructed that if, from the evidence, they believed that the defendant agreed to stand in the place of Kelly, he would be liable to the plaintiff for all the work done by him on the house, although his agreement was not in writing.

The defendant excepted, and prosecutes his writ of error to reverse the judgment.

GREEN, for the plaintiff in error, cited *Larson v. Wyman*, 14 Wend. 246; *Watson v. Randall*, 20 id. 201; *Tompkins v. Smith*, 3 S. & P. 54.

HAIR, *contra*.

GOLDTHWAITE, J.—The cases upon the clause of the statute of frauds, which relate to promises to answer for the debt, default or miscarriage of another, are said to relate either to the nature of the *undertaking* or to the nature of the *consideration* on which the undertaking is founded.

The principal distinction, with respect to the undertaking, recognized by the Court, is between one that is *original* and one that is *collateral*. The law is certainly well established that if the person for whose debt, default or miscarriage the undertaking is made, be liable at all so that the whole responsibility does not rest upon the second promissor, the second promise is *collateral*, and is void by the statute if not reduced to writing. Many of the cases to establish this doctrine are collected in the note to *Leonard v. Vredenburg*, [8 John. 23.]

On the other hand, if no other person is liable for the same debt, &c. for which the promise is made, although another may be liable for a distinct debt, which is the measure of that in question, then the undertaking is an original one, and is not within the statute. The cases which exemplify this distinction are also collected in the same note.

These seem to be cardinal rules in the exposition of the statute of frauds, and are sufficient to enable us to decide the pre-

sent case. It appears that the contract was originally made between Kelly and Bates, and that the work was performed by the latter, in conformity with this contract. After the work was commenced, and whilst it was progressing, but before its completion, Kelly left the State, and Puckett then promised he would pay if Bates would proceed with the work.—It is certain that Bates has his action against Kelly under this state of proof, and therefore, within the first rule as set out, the promise of Puckett must be considered as collateral. It is also certain that Kelly is liable for the *same* debt as that now sought to be enforced under the verbal promise, and the payment by Puckett would be a discharge of all claim by Bates against Kelly.

If the evidence in the Court below had been such as to show that Bates repudiated his contract with Kelly, after the latter had abandoned the State, if such indeed is the fact, and had refused to proceed farther with the work, then he would have been responsible to Kelly for a breach of the contract; and if after such repudiation, Puckett procured him to proceed with and finish the work, we are not prepared to say that this would not be an original undertaking on his part; or that he would not be liable for any verbal promise connected with it. In such a case it is probable there would be no liability retained against Kelly, and therefore there could be no pretence that the promise by Puckett would be collateral to any other.

Our conclusion is that the judgment must be reversed and the cause remanded.

BORAIM & Co. v. DA COSTA.

1. Where an attachment ancillary to an action brought in the usual manner, is improperly dismissed, a *mandamus* is the appropriate remedy in order to its reinstatement; and a rule will be awarded requiring the Judge of the proper Court to show cause why a peremptory writ should not issue, although notice has not been given that the motion will be made.

THE plaintiffs, by their counsel, have presented to this Court a record of the County Court of Mobile, showing that on the 29th April, 1840, they brought an action of *assumpsit* against the defendant, in that Court, on several promissory notes, amounting in the aggregate to the sum of eighteen hundred dollars, or thereabouts, exclusive of interest and exchange. On the 21st May, 1840, the plaintiffs caused an attachment to be issued pursuant to the statute, as ancillary to the action, which attachment was levied on the same day on merchandize and a replevy bond executed therefor. At the return term of the attachment, a motion was made to quash it, on the ground that the bond executed by the plaintiff was insufficient; this motion being continued until the next term, was accordingly granted. Afterwards the plaintiffs recovered a judgment by *nil dicit* against the defendant for the amount of the notes and interest, and in order to make the same available, now move for a writ of *mandamus* to be directed to the Judge of the County Court of Mobile, requiring him to reinstate the attachment in his Court.

CAMPBELL, for the motion.

COLLIER, C. J.—In *Eslava v. Rigeand*, [3 Ala. Rep. 363,] we determined that where an attachment assistant to an action brought in the usual manner, was improperly dismissed, the judgment of the Court could not be corrected by writ of error; that the attachment was merely an accessory to the suit, and if the principal judgment was unobjectional the Court would not look into the order of dismissal, inasmuch as an

Holt v. Moore.

error there would not authorize the cause to be remanded. But it was intimated that in default of another appropriate remedy a *mandamus* might be awarded. Such is still our opinion.

We have looked into the record, and do not discover that the attachment bond is so obviously defective that we should overrule the motion entirely; yet we do not feel authorized to issue a peremptory *mandamus*. The usual practise is, when the applicant has made out a probable case, to grant a rule upon the defendant to show cause why the writ should not issue. [Willcock on Municipal Corporations, 209.] This course is certainly proper in the present instance, if for no other reason because the defendant had no notice, and consequently could not gainsay the motion.

It is therefore ordered that a rule issue to the Judge of the County Court of Mobile, requiring him to show cause why a *mandamus* should not issue in conformity to the motion of the plaintiffs.

HOLT v. MOORE.

1. Where the assignor of a note is Judge of the County Court of the county where the suit must be brought against the maker, it will be sufficient to charge the assignor to bring such suit to the next Circuit Court of the county.

ERROR to the Circuit Court of Pickens.

Assumpsit by the plaintiff in error, as assignee, against the defendant in error as assignor of a promissory note executed by E. H. Moore & Co.

The declaration, which is in the usual form, charges that suit was brought against the makers "to the first Court of the aforesaid county, of the residence of said E. H. Moore & Co. to

Holt v. Moore.

which a writ could properly be made returnable, to wit: to the October term of the Circuit Court of Pickens county, A. D. 1839," and proceeds to aver that judgment was obtained, and that the writ of *feri facias* which issued thereon was returned no property found.

The defendant pleaded, first, non assumpsit—second *actio non*, &c. because he says that the said plaintiff did not bring his suit against the makers of the said note mentioned in the declaration, to the first Court of the county where they reside, to which suit could be brought, to wit: to the County Court of said county, which was holden on the fourth Monday in July, 1839, and this, &c.

To the second plea the plaintiff replied, "*precludi non*, because though true, it is that suit was not brought to the County Court, as in the said plea mentioned, yet the said plaintiff says that the said defendants were at the time of the maturity of said note and at the time when suit should have been commenced to the County Court aforesaid, and for a long time before and after, the sole and presiding Judge of the said County Court, and the plaintiff avers that suit was brought to the first Court after the maturity of said note to which a writ could properly be made returnable, and this, &c.

To this replication the defendant demurred, and the Court sustained the demurrer, and rendered judgment for the defendant, from which the plaintiff prosecutes this writ, and assigns for error the judgment of the Court on the demurrer.

CRABB & COCHRAN, for plaintiff in error.

ELLIS, contra.

ORMOND, J.—The act of the Legislature by which this proceeding is regulated, requires, in the case of assignment of paper not mercantile, that to charge the assignor, suit must be brought to the first Court to which it can be brought against the maker of the assigned paper, prosecuted to judgment, and a return by the sheriff of no property found.

In the exposition of this statute several exceptions have been engrafted upon it, as that the suit may be dispensed with against the maker, when from his absence from the State suit is impossible. [5 Stewart and Porter, 96; 2 Porter, 456.]

Strongly as we feel indisposed to make another exception to the statute, we feel compelled to allow it in this case, from the thorough conviction that the Legislature could not have intended that one should sit in judgment upon his own case, or upon the trial of a cause in which he had a direct interest.

This case has been supposed by elementary writers, by way of exemplifying a general rule. Thus, Blackstone in his commentaries, to express the transcendent power of parliament, while he admits the indecency and gross impropriety of such a law, says that if the intention to confer such a power is clear and plain, so as to leave no doubt of the intention of the Legislature, no Court has power to defeat such intention. [1 Bl. Com. 91.] On the other hand, Mr. Justice Chase, in the case of *Calder v. Bull*, [3 Dall. 386,] scouts the idea that such a law should be enforced by the Courts: "That it was against all reason and justice for a people to entrust a Legislature with such powers, and therefore it cannot be presumed they have done it. The genius, the nature and the spirit of our State governments amount to a prohibition of such acts of legislation, and the general principles of law and reason forbid them."

We do not however consider that the power of the Legislature to pass a law authorizing a Judge to try a cause in which he is interested, is in question here, as no such attempt has been made. It cannot be presumed that the Legislature intended that the suit which was required to be brought should be commenced in a Court, the sole Judge of which was directly interested in the event. It cannot be presumed, because such suit would be nugatory, and therefore falls within the admitted exception of the non-residence of the maker. It is supposed that the Judge of the County Court would transfer the cause to the Circuit Court. It is true that by statute, [Aikin's Dig. 246,] when the Judge of the County Court is related, by affinity or consanguinity to either of the parties to the suit, or has been employed as counsel, that the suit shall be transferred to the Circuit Court, and although no power is expressly given to transfer a cause when the Judge is interested in the event, it would doubtless be within the spirit of the act, as provision is made for such a case when the Judge of the County Court is

setting as a Court of *ordinary* for the settlement of estates. [Aik. Dig. 253.]

But as we have repeatedly held that the Legislature did not require suit to be brought when the suit would be of no avail, why commence a suit where it could not be tried, but must be transferred to another forum? Such, in our opinion, cannot be presumed to have been the intention of the Legislature—the manifest design was to provide, in *lieu* of demand and notice, a speedy pursuit of the maker, to the presumption of insolvency afforded by the return of “no property found,” to the execution issued on the judgment against him. This has been done in this case, and if not within the letter of the act, is certainly within its spirit and meaning, and fully within the principle of the adjudged cases of admitted exceptions to the law.

It is, however, insisted that the Judge of the County Court was not necessarily interested in the suit, or that if he had an interest, it was not that judgment should be delayed, but that it should be speedily obtained against the maker. If he had an interest in the event, it is certainly unimportant which of the parties litigant it was to prejudice or benefit; but no aspect of the case can be supposed in which his interest would not be direct. If the maker should desire to make an off-set against him as payee, he would have a direct interest in defeating it, as the success of the set-off would be to charge him on his endorsement. If the defence was payment to the assignee, it would be his interest that the defence should succeed, as thereby he would discharge himself altogether. If the defendant was insolvent, he would be interested to prevent a judgment from being obtained, as until judgment was obtained against the maker, no suit could be commenced against him; and if solvent, his interest would be to hasten the obtaining the judgment, lest the maker might, from the vicissitudes and changes so common in the country, become unable to pay if delay should supervene.

It is unnecessary to pursue this subject to ascertain the *quantum* of interest which the defendant might have had; the purity of the judicial station will not tolerate such inquiries, nor the known infirmity of human nature permit one to fill at the same time such incompatible stations as party and Judge.

Holt v. Moore.

It is sufficient that the defendant was interested in the event—The title was derived from him, and he had guaranteed that by the use of due diligence, the money could be made from the maker, and whether this responsibility was small or great it incapacitated him from setting as Judge in the cause.

It is scarcely necessary to add that it is not presumed that the Judge in this case would have proceeded to try the cause, or that a doubt can be entertained that he would have refused to sit in the cause, and would have transferred it to the Circuit Court.

Whether the law as here laid down would apply, if the assignor were not the sole Judge authorized by law to preside in the Court to which the suit is brought, it is not necessary now to determine.

Let the judgment be reversed and the cause remanded.

COLLIER, C. J.—

The second section of the act of 1828, declares, that all contracts in writing for the payment of money, &c. shall be assignable, &c. and the assignee may maintain an action thereon, &c. “*Provided*, suit be brought to the first Court of the County where the maker resides, to which suit can be brought, and if he fail to sue the maker to the first Court, as herein provided for, the indorsee shall be discharged from liability, unless suit shall be delayed by his consent.

The statute of 1829, (one of the objects of which was to explain that of 1828,) enacts, “That part of the *proviso* in the second section of the before recited act, which requires suit to be brought to the first Court, shall be construed to be, that suits be brought to the first Court to which the suit can properly be made returnable.” [Aik. Dig. 330.]

This explanation was entirely unnecessary, for it never would have been supposed that the law intended the maker should be sued to the term of a Court to which process could not have been regularly returned, yet it serves to show the strictness with which the Legislature construed its own act, and should rather limit than extend judicial discretion.”

It is certainly true, that in the interpretation of all statutes, the legislative will, as ascertained from the terms employed,

should be effectuated. But Courts must not, in order to give effect to what they may suppose to be the intention of the Legislature, put upon the provisions of a statute a construction not supported by the words, though the consequence should be to defeat the object of the act. [Rex v. Stokedamerel, 7 B. & C. Rep. 569.] Where words of unequivocal import have been employed, it would be dangerous to hold that the Legislature did not mean what it has expressed. The correct course in all cases where the intention of the Legislature is brought in question, is to adhere to the words of the statute, construing them according to their nature and import. [Rex v. Ramsgate, 6 B. & C. Rep. 712.]

In Rex v. Barham, [8 B. & C. Rep. 104,] Lord Tenterden said, "Our decision may, perhaps, in this particular case, operate to defeat the object of the statute; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to be the intention of the Legislature." Upon another occasion the same learned Judge said, "The words may probably go beyond the intention, but if they do, it rests with the Legislature to make an alteration; the duty of the Court is only to construe and give effect to the provision." [Notley v. Buck, 8 B. & C. Rep. 164.] In considering the game laws, Mr. Justice Ashurst remarked, "It is safer to adopt what the Legislature have actually said, than to suppose what they meant to say. The heir apparent they have qualified from a supposition the esquire was so already. I cannot think it was their intention purposely to exclude the father, but in fact they have done it." [1 T. Rep. 52; see also, Rex v. Turvey, 2 B. & A. Rep. 522; Rex v. Bray, 3 M. & S. Rep. 20; Rex v. Inhabitants of Great Bentley, 10 B. & C. Rep. 527.]

In Brandling v. Barrington, [6 B. & C. Rep. 475,] it was held, that to bring a case within the statute, it should not only be within the mischief contemplated by the Legislature, but also, within the plain, intelligible, import of the words of the act of Parliament. [See also 1 T. Rep. 52; Edrick's case, 5 Co. Rep. 118.]

To these citations might be added many others, in which Judges have expressed themselves in strong terms against a latitudinous construction of statutes, under the pretence of giv-

ing effect to the will of the legislature. It has been often lamented that the words of the statutes of frauds and limitations should not have been more closely followed in their construction, and the current of decision at the present day, is to gather their meaning from the language employed, rather than indulge in perplexing conjectures of the evils and objects intended to be remedied.

In the present case it is not pretended that the makers of the note might not have been sued in the County Court, but it is insisted that as the case could not have been tried by the Judge of that Court, the plaintiff was under no legal obligation to commence his suit there. This argument, in my opinion, cannot be maintained. The Legislature have in express terms declared, that the indorsee of paper, such as that in question, shall sue the maker "to the first Court to which the writ can properly be made returnable," and it is not for the Court to say that this requisition is not peremptory; but is governed by circumstances remote and hypothetical. It is conceded that no Judge should preside at the trial of a cause in which he is interested, but that a statute declaring him competent would be void, where it does not conflict with the constitution, is what I do not admit. I am aware that such a doctrine is avowed by Lords Coke, Hobart and Holt, and Mr. Justice Chase, but it has received no support from any other source. The true rule upon the subject is that laid down in my opinion in "The Matter of John L. Dorsey," [7 Porter's Rep. 416,] viz: "If absurd consequences seem to grow out of a statute, the Judges ought in decency to conclude that the consequence was not foreseen by the Legislature, and only *quoad hoc* to disregard it." [See 1 Bl. Com. 91.]

But the question is not whether an act of the Legislature, if carried out, would require a Judge to decide his own case. It could not be known that the makers of the note would have resisted a recovery, if they did not, it would have been entirely competent for the Judge to render a judgment against them, and if they did, it was his duty, under the statute, to transfer the case to the Circuit Court. That the Judge would have performed this duty with promptness cannot be questioned—his oath of office obliged him to do it.

Suppose a suit had been brought against the makers in the

County Court, and an order for its transfer made to the Circuit Court, would it not when transferred have been placed on the trial docket? The pleadings, without an order extending the time would have been made up in the County Court, at the appearance term, so that it would, when removed after the close of that term, have been entitled to a place on the trial docket; and in this way judgment would be obtained sooner than if such suit had been brought in the Circuit Court.

The idea then, that the defendant being a Judge of the County Court, was a sufficient reason for dispensing with the express requirement of the statute to sue the makers of the note to the first Court to which the writ could have been returned, is wholly inadmissible. 1. Because the act directs that the suit shall be thus brought. 2. By the failure to comply with the statute, the indorsers responsibility is increased, or rather prolonged, in proportion to the time for which the indorsee omits to sue the makers.

Without attempting to review the cases which have been decided on the acts of 1828 or 9, it may be quite enough to say that none of them go to the extent of the exception now made to the mandatory terms of these statutes. [Cavanaugh v. Tatum, 4 Stew. & P. Rep. 204; Roberts v. Kilpatrick, 5 Stew. & P. Rep. 96; Woodcock v. Campbell, 2 Porter's Rep. 456; Ivey v. Sanderson, 6 Porter's Rep. 420; Rathbone, use, &c. v. Bradford, 1 Ala. Rep. N. S. 312; Riddle v. Rourke, id. 394; Person v. Mitchell, 2 id. 736.]

The principle of this exception is so broad that it is difficult to define its limits; and not being prepared to acquiesce in its correctness, I am of opinion that the judgment of the Circuit Court should be affirmed.

FOSTER v. MABE.

1. Where the owner of a freehold by a parol agreement permits another to have a house which he had erected, to do with as he will, and with a view to its severance from the freehold ; by this agreement the house becomes a chattel, and may be levied on and sold as the property of him who is invested with the ownership.
2. It is the duty of the sheriff to have personal property present at the time and place of sale, but if this is not done, and a sale made, the property being absent, the sale is not void, but the purchaser acquires the title, subject to be divested by the order of the Court from which the execution issued, setting it aside.

WRIT of Error to the Circuit Court of Greene county.

Detinue to recover a quantity of lumber.

The cause was tried on the general issue, and a verdict returned in favor of the plaintiff, Mabe, on which judgment was rendered. A bill of exceptions was sealed at the instance of the defendant Foster, which discloses the following facts.

One Alexander was seized and possessed in fee of a lot of land in the town of Eutaw, in Greene county, he made a parol agreement to sell the lot to one Quarles for five hundred dollars. Quarles, under this agreement, entered into possession of the lot, and erected on it several houses, one of which was a frame house, forty feet long, sixteen feet wide, and was built on large blocks resting on the ground. At the September term, 1840, of the Circuit Court of Greene county, one Hines recovered a judgment against Quarles, on which execution issued, and was put in the sheriff's hands on the 25th September, 1840. Quarles having become embarrassed and unable to pay for the lot, made another parol agreement with Alexander, about the first January, 1841, by which it was agreed that Alexander should retake possession of the lot, and pay Quarles for the other improvements, but that Quarles should have the house before described to do as he pleased with. About the 20th of January, 1841, Foster, the defendant, bought the house then standing on the lot from Quarles, for two hundred and fifty dollars. On the 22d of January 1841, the sheriff

Foster v. Mabe.

levied the execution of Hines on the house as it then stood on the lot, as goods and chattels of Quarles, and sold the same under the execution, on the 8th day of February, 1841. Foster claimed the house and forbid the sale. Mabe purchased it at the sale for one hundred and forty dollars, and had notice of Foster's claim. The house at the time of sale was still standing on the lot. The sale was made before the Court House door of Greene county. The house was more than three quarters of a mile from the place of sale, and could not be seen or examined by those present at the sale; but it was described to the persons then there. After the sheriff's sale Mabe pulled the house down and piled the lumber on the lot; and Foster afterwards removed the greater part of it. Alexander, the owner of the lot, was aware of the levy, and set up no claim to the house.

On this state of evidence the Court charged the jury, that if there was an agreement between Quarles and Alexander that Quarles was to have the house and dispose of it as his own, this was a severance which made the house a chattel of Quarles' and it was liable to be levied on and sold under the execution against him. Also, that though as a general rule, a chattel sold by the sheriff ought to be present at the time and place of sale, yet this general rule must be taken with some qualifications, and if the jury believed, from the peculiar nature and situation of the house, and the description given of it by the sheriff, the bystanders could form a correct idea of its value, the sale would not be void because the house was not present so as to be examined by the bystanders.

Foster excepted to these charges, and now seeks to reverse the judgment on the ground that they are erroneous.

JONES, for the plaintiff in error, submitted—

1. That the house, under the facts stated, was either a real estate or a fixture, and not a chattel; therefore not subject to levy and sale. [2 Bac. Ab. 714; 2 Kent's Com. 279; Elwes v. Mawe, 3 East, 38; Goddard v. Bilster, 6 Greenl. 427; Winn v. Ingleby, 5 B. & Adol. 7 E. C. L. R. 214; Farrant v. Thompson, 5 B. & Adol. 7 E. C. L. R. 272.]

2. Conceding it to be a chattel, the sale was void and passed no title, in consequence of its not being present when sold

by the sheriff. [Shelden v. Soper, 14 John. 353; Linmadole v. Doe, id. 222; Cresson v. Stout, 17 id. 115; Blount v. Mitchell, Taylor's N. C. Rep. 131; McDaniel v. Moody, 3 Stewart, 314.]

CLARK, contra, insisted that inasmuch as the owner of the lot had consented to the severance of the house from the freehold, it became a chattel, and subject to be seized by execution. [1 B. & A. 161; 1 Taunt. 19; 20 John. 29; 2 Peters', 137; 1 Starkie's Rep. 43; 1 Salk, 368; 4 Mass. 514; 3 McCord, 553, 557; 2 B. & C. 76; 1 Hill's N. Y. 176; Gibbon on Fixtures, 48.]

In answer to the second position assumed by the plaintiff in error, he insisted that this was a question only to be raised by the defendant in execution. [Cotton Press v. Moore & Magee, 9 Porter, 679; Jones v. Davis, 2 Ala. Rep. 34; Ware v. Bradford, id. 676; Brown v. Lipscomb, 9 Porter, 472; 4 Rand. 427; 3 Caines, 267; 8 John. 364; 18 id. 367; 1 N. & McCord, 11, 408; 5 John. 345; 2 Bibb, 401; 3 id. 216; 3 J. J. M. 213; 7 Dana, 388; 1 Missouri Dec. 754; 2 Mar. 364.]

GOLDTHWAITE, J.—1. The validity of the sheriff's sale, through which the plaintiff in the Court below derived his title to the lumber sued for, is denied; and one of the objections to it is, that the house was not a chattel subject to execution.

As between Alexander, the owner of the fee, and Quarles, who was in possession under him as a purchaser, no question arises, for both of them have treated the house as mere personal property. We must then consider whether their action in this respect has the effect to determine the character of the house as real or personal estate. It is said that the law by which a trade tenant is permitted to have an interest in fixtures erected by him and attached to the freehold, is an exception to the general law, which Courts have always, since the case of *Elwes v. Mawe*, [3 East, 38,] refused to extend beyond that class of tenants; but this we apprehend, is not the precise question in this case, which is rather whether the owner of the fee can so deal with a fixture, as to divest it of its character of real estate.

The first case bearing on this point, which is found in the

books is in 1 Lord Raymond, 182, where Treby, Chief Justice, said the question arose before him, whether the sale of lumber growing upon land, ought to be in writing under the statute of frauds, or might be by parol. And he was of opinion, and so ruled, that it might be by parol, *because it is but a bare chattel*. So likewise corn or other crops growing or sown on the grounds *which go to the executor*, may be sold under a *feri facias*. [Dalton 556, cited in Watson on Sheriff, 130.] In these cases it is evident that the thing sold, or subject to execution, is attached to, and if the question arose between a vendor and vendee, would be considered as a part of, the freehold, and pass with it; but in the first case put, of the timber, the act of the party had reference to its severance from the land; and in the last, of the growing crops, this same consequence was in view from the time of planting. In both the intention of severance determines the character of the thing. The same idea is very fully illustrated by some of the decisions under the statute of frauds in those cases, where the question whether an interest in lands has been sold so as to require the sale to be evidenced by writing.

The sale of a *growing* crop was formerly considered in England as conveying an interest in the soil by which it was to be nurtured and matured. [Crosby v. Wadsworth, 6 East, 602; Emmerson v. Heelis, 2 Taunt. 38.] But when the crop has *ceased to grow*, and is at maturity, a different rule is supposed to govern. [Parker v. Staniland, 11 East, 362.] And in this last cited case the true rule is adverted to, though not distinctly set out—that an immediate severance from the land of the article grown was in contemplation of the parties.

The sale by a landlord to his tenant of fixtures attached to the estate, and *vice versa*, has never been considered as within the statute. [Hallen v. Render, 3 Tyr. 959, cited Gibbon on Fixtures, 48.] And it is evident that these decisions could never have been regarded as correct in principle upon any other ground than that the fixtures, by the agreement of the parties, were treated as chattels, with a view to an ultimate severance from the freehold. Many other decisions analogous in principle, it is supposed, might be found in the English Reports, but these are amply sufficient to show, that where a matter connected with the freehold is a personal chattel when

severed, it may be treated as such whenever either the law or the agreement of the parties contemplate an actual severance. A case more strongly illustrative of the rule than any of the English decisions, is *Bostwick v. Leach*, [3 Day, 476,] where an agreement to purchase the mill stones, running gear and other fixtures then attached to a mill, was considered as an agreement for the sale of *chattels*, and therefore not within the statute. It is there said, "when there is a sale of property which would pass by a deed of land as such, without any other description, if it can be separated from the freehold, and by the contract is to be so separated, such contract is not within the statute."

Such are the contracts for the purchase of gravel, stone, timber trees, and the boards and bricks of houses, to be pulled down and carried away.

In the case before us, it is not expressly stated that Quarles was to remove the house immediately after the purchase, (for such we consider it,) from Alexander; but the inference is warranted that a removal within a convenient time, was contemplated by both parties. The moment that Alexander consented that Quarles should do as he pleased with it, the house became a personal chattel, and was consequently subject to levy and sale as the property of Quarles, under the execution of Hines.

2. The other question is one of less difficulty, and is in some degree within the influence of previous decisions of this Court. It is supposed the sale was void, because the property was not present at the time and place of sale. Nothing is more clear than the duty of the sheriff to have the property present at the time and place of sale; and the reason is obvious—he is directed to sell the property at public vendue, and to be sold well it should be exhibited; but this is a matter which concerns no one but the defendant in execution, or possibly some other execution creditor. And the first, and probably the other likewise, may set aside an irregular sale on timely application to the Court from which the execution issued, as was done in the case of the *Mobile Cotton Press v. Moore & Magee*, [9 Porter, 697] The course of proceeding there indicated is sufficient to preserve the rights of the parties from invasion by an irregular sale. The case of *Brown v. Lipscomb*, [id. 472,] establishes

that when property is sold by a trustee, which is held adversely at the time of sale, nothing passes to the purchaser, because in such a case, the attempt to sell is against public policy, as a right of action only is then vested in the trustee. In other respects this case sustains the doctrine that a stranger, or one claiming by a title subordinate to the trustee, cannot avail himself of an irregularity in the sale. The case of *Ware v. Bradford*, [2 Ala. Rep. 676,] determines that the defendant in execution cannot collaterally impeach the regularity of a sheriff's deed of land. The same was held as to personal property in *Fournier v. Curry*, at this term. These cases are considered as conclusive of the present case on this point; and we may farther add that there is no reason applicable to sales of real estate which will not apply with the same force to sales of personal chattels, except only where there is an adverse possession, which does not affect the former but will avoid the latter.

By the levy the sheriff had obtained all the possession he could without removing the house, and we must presume, in the absence of any evidence to the contrary, that he invested Mabe with it. This made the title of the latter complete against every one claiming under the defendant in execution, until the sale was set aside by the Court from which the execution issued.

We have omitted all examination of the authorities cited from New York to show that a sale of this description is void, because if such is the law in that State, it could have no influence to change our decision, for the reason that our own system must govern, and harmony ought to prevail between the decisions applicable to real and those of personal estate.

Our conclusion is, that there is no error; and the judgment is therefore affirmed.

BOOKER'S EX'RS. v. JEMISON AND STEWART.

1. A decree of the Orphans' Court was rendered between the same parties, that a certain sum be paid by the one party to the other as guardians, &c. that another sum be paid them for services, and that a further sum be paid them for monies advanced, and concludes by ordering that executions issue for these several sums—*Held*, that a writ of error which proposes to revise the decree in respect to one only of the sums adjudged to be paid, cannot be sustained; but to authorize an appellate Court to take jurisdiction the entire decree should be brought up.

WRIT of Error to the Orphans' Court of Pickens.

The decree complained of, adjudges that the sum of four thousand one hundred and one dollars and sixty-one cents, should be paid by the plaintiffs in error to the defendants, as guardians of Edith M. Booker; further, the sum of seven hundred and twenty dollars and thirty-seven cents should be paid them as a compensation for services, &c.; and lastly, the sum of one thousand six hundred and fourteen dollars and seventy-seven cents should be paid them for moneys advanced, &c. The decree concludes thus: "Ordered that executions may issue for the aforesaid several sums of money." The writ of error only complains of the decree, so far as it directs the payment of four thousand one hundred and one dollars and sixty-one cents, and the defendants now move to dismiss the same as irregular.

CRABB, with whom was COCHRAN, for the motion.

J. B. CLARK, contra.

COLLIER, C. J.—It is well settled that where a judgment is given against several, any one of them may sue out a writ of error, but this must be done in the name of all. [1 Arch. Prac. 232, and cases there cited; *Caller v. Brittain*, Minor's Rep. 27; *Eastland v. Jones et al*, id. 275; *Tombeckbee v. Freeman*, id. 285; *Adams v. Robinson*, *ibid*; *Burn et al v. McLean*, id. 208; *Jameson v. Colburn*, 1 Stew. & P. Rep. 253.] In

Billinslea v. Abercrombie, [2 Stew. & Por. Rep. 24,] one of several legatees prosecuted a writ of error in his own name from a decree of the Orphans' Court distributing the testator's estate among all of them. The Court said, "Our statute does not define who are to be parties to such a writ of error, or appeal, but it is believed that it is so well established by the uniform practice of Courts, that all who are to be affected by the judgment, or order, so sought to be reversed, should in some way be made parties; that it does not require the aid of any express legislative enactment to secure this privilege. All of the legatees who were satisfied with the order of distribution, were interested in supporting it, and had as strong claims to be heard before the order should be reversed, as Thomas Abercrombie, the one selected as a defendant." To the same effect is the case of *Merrill v. Jones*, [2 Ala. Rep. 192.] This rule is founded in convenience, and calculated to expedite the administration of justice; for if each one of the parties who supposed himself aggrieved by a judgment or decree, could bring a writ of error by himself, the judgment might be suspended in its operation until it had been affirmed once or oftener.

At the common law, a writ of error had the effect, when allowed to supersede the execution, if it had not been levied, and it removed the record to the appellate Court. [1 Arch. Practice, 233, *et post.*] This being its effect, a writ of error which removed part of the cause, could not be sustained. If the law were otherwise one decision would not terminate litigation, where a decree directed the payment of several sums of money, but in order to its affirmance *in toto*, distinct writs of error might be brought to revise the propriety of the direction of the payment of each sum. Such a course of procedure would be quite as objectionable as the prosecution of separate writs by each of several defendants.

In *Dale v. Mosely*, [4 Stew. & P. Rep. 371,] which was the trial of the right of property, a writ of *feri facias* had been levied on two slaves as the property of a third person; they were claimed by the plaintiff, and a verdict found against his claim. A new trial on motion of the claimant was granted as to one of the slaves and refused as to the other. To review

Booker's Ex'rs. v. Jenison and Stewart.

the judgment so far as it was not set aside plaintiff sued a writ of error. The defendant moved to dismiss the writ of error, and the Court said, "After issue had been formed, and a verdict on it, we believe that the Court below had no authority to sever the matter put in issue and found by the jury; that the new trial should have been entire, or not at all. We believe it would have been competent for the Court below to have offered the complainant his choice, to take a new trial for one of the slaves, on condition of his relinquishing his claim to the other. But this was not done, and the consequence is, that the claimant has sought to reverse the judgment of condemnation against the one whilst the suit as to the other remains undetermined. The claimant was not compelled to accept the new trial; he might then have brought the whole case up." It is then concluded that the writ of error should be dismissed.

The right to bring error upon a decree of the Orphans' Court is given by a statute, which enacts that "from any judgment or order final, whether in vacation or term time, an appeal or writ of error shall lie to the Circuit or Supreme Court, in the same manner as upon judgments of the Circuit Courts." [Aik. Dig. 246.] But for this act it might well be questioned whether a decree of the Orphans' Court would be revisable on error, if, as has repeatedly been decided, it is a general rule, that where a new jurisdiction is created by statute, and the Court exercising it proceeds in a summary method, or in a course different from the common law, a *certiorari* is the only proper remedy. [1 Arch. Prac. 229; *Ex parte* Tarlton, 2 Ala. Rep. N. S. 35.] But whether considered with or without a reference to the statute, no writ of error can be sustained in this case, which does not remove to the appellate Court the decree *in toto*.

In the case at bar, both the plaintiffs and defendants are parties to the entire decree. The first order therein, which ascertains the sum of four thousand one hundred and one dollars and sixty-one cents to be due to the defendants as guardians of Edith M. Booker, and directs it to be paid to them in that character, is in their favor, and might be collected by an execution which omitted to describe them as guar-

dians. Although the decree directs that executions may issue, &c. we think it would be entirely competent, and perhaps the only regular mode to coerce payment, to issue one execution for the several sums. It is not pretended that the decree may not be removed by a single writ of error, and we think it is not allowable to issue several. The consequence is, the writ of error must be dismissed.

BEARD v. CHILDRESS.

1. A bill of sale in the following words—"Received of Thomas B. Childress, trustee of James Childress, Hubert Childress and Thomas Childress, children of the said Thomas B. Childress, the sum of thirteen hundred and fifty dollars in full for two negro slaves named Sam, twenty-six years of age, and Frank, twenty-two years of age, which I warrant and defend against the claims of all persons whatsoever, and also warrant the said negroes to be sound and healthy, and free from all incumbrance,"—invests the father with the legal title to the slaves.

ERROR to the Circuit Court of Pickens.

Detinue for two slaves by the defendant against the plaintiff in error.

On the the trial of the cause the plaintiff, as the foundation of his title offered the following instrument:

Received, of Thomas B. Childress, trustee of James Childress, Hubert Childress, and Thomas Childress, children of the said Thomas B. Childress, the sum of thirteen hundred and fifty dollars, in full, for two negro slaves, named Sam, twenty-six years of age, and Frank, twenty two years of age, which I warrant and forever defend against the claims of any person whatsoever, and also warrant the said negroes to be sound

Beard v. Childress.

and healthy and free from all incumbrance whatsoever. Given under my hand and seal, 1st March, 1838.

JOHN BEARD, (*seal.*)

Which being the only evidence of title, was objected to by the defendant as insufficient for that purpose, but the Court overruled the objection and permitted the evidence to go to the jury, to which the defendant excepted.

The assignment of error questions the propriety of this decision.

ELLIS, for plaintiff in error.

CRABB & COCHRAN, contra.

ORMOND, J.—The instrument referred to in the bill of exceptions is exceedingly ambiguous, leaving it doubtful whether it was the intention of the parties to vest the legal title in the father or in the children.

We incline, however, to the opinion, that it was intended that the legal title should be in the father, as, otherwise, it is not probable that it would have been disclosed in the bill of sale that he was acting as the trustee of his children.

From this view it follows that the decision of the Court was correct, and its judgment is therefore affirmed.

COLLIER, C. J.—I concur in affirming the judgment of the Circuit Court, but am mainly influenced by other reasons than those expressed by my Brother Ormond. I felt it proper to make this declaration, but do not deem it necessary to make a particular expression of my views of the case.

BROWN v. BAILEY.

1. A declaration for an injury to cattle is not supported by evidence of injury done to mules. The term cattle, in its usual and ordinary acceptance in this State does not include mules.

WRIT of Error to the Circuit Court of Sumter county.

Brown declared in trespass against Bailey for wounding *certain cattle*. At the trial on the general issue, the evidence was, that the defendant had killed one mule and wounded another. The Court charged the jury, that the allegation of an injury to cattle was not supported by the evidence of an injury to mules. The plaintiff excepted, and now questions the correctness of this decision.

SMITH, for the plaintiff in error, insisted that mules are included under the general term cattle. Under an English statute against maiming cattle, it has been held to include horses, mares, colts. [2 Starkie Ev. 5 Am. ed. 502; Roscoe's Crim. Ev. index, Cattle.]

BOND, contra, contended that words were to be considered in their usual and customary acceptance; and whatever meaning is attached to the term cattle in England, here it means only neat cattle, as oxen, Cows, &c. or small cattle, as sheep and goats.

GOLDTHWAITE, J.—Whatever may be the meaning given to the term cattle elsewhere, it is certain that with us it never is considered, in common parlance, to include either horses or mules. The legislation of the State frequently uses the term as distinguishable from horses and hogs—and by it neat cattle seem to be usually intended. Thus, persons who have horses, cattle, or other stock, shall have a brand or mark. [Dig. 79, §1.] So it is not lawful for any drover to drive horses, mules, cattle, hogs or sheep, from the range to which the

Gilleland, use, &c. v. Ware et al.

same may belong. [Id. 80, §5.] Importing *cattle* afflicted with a contagious distemper, is punishable by a fine of ten dollars *per head*—stealing neat cattle, hogs, sheep or goats, is punishable in a different manner from the stealing of horses and mules. [Id. 104, §23.]

We consider it proper to hold the plaintiff to the usual meaning of the term, and the more especially, as evidence of the kind which was before the jury, must have been a surprise on the defendant.

Let the judgment be affirmed.

GILLELAND, USE, &C. V. WARE ET AL.

1. It is competent for a Justice of the Peace to quash an execution issued by himself, and a party prejudiced by a refusal to quash, may remove the proceeding into a higher Court by *certiorari*.
2. A judgment was rendered against B. W. by a Justice of the Peace, who made an entry on his docket thus, "Stayed sixty days, R. H. Ware security;" an execution issued against B. W. and R. H. W. which was levied on B. W's. property, and a forthcoming bond executed with R. H. W. as surety; afterwards an execution issued on the forthcoming bond and was levied on R. H. W's. property—*Held*, that although there was no stay bond, and the first execution was void as to R. H. W. yet it would not be avoided so as to affect the levy on B. W's. property; and consequently the execution issued on the forthcoming bond would not be set aside.

WRIT of Error to the Circuit Court of Talladega.

The plaintiff in error recovered a judgment before a Justice of the Peace on the 30th March, 1839, for forty-five dollars and ninety-three cents. The Justice made a statement on his docket as follows, viz: "Stayed sixty days, R. H. Ware, security." An execution issued against Bennett Ware and Richard H. Ware, on the 31st May thereafter for the amount of the judgment and costs, which was levied on the property of

the former, and a delivery bond taken with the latter as surety. The bond was forfeited and an execution issued thereon from time to time, till a *pluries execution* was levied on the property of Richard H. Ware, in May, 1841. On this levy another delivery bond was taken, with J. Hancock as the surety.

A motion was made before the Justice, on the 7th August, 1841, to quash the forthcoming bonds, and the execution last issued, but that motion was overruled: thereupon Richard H. Ware petitioned a Judge of the Circuit Court for a certiorari to remove the proceedings, so far as they concerned him into that Court; the prayer of his petition was granted and the case accordingly brought up.

A motion was made in the Circuit Court by the defendants to quash all the proceedings before the Justice of the Peace subsequent to the original judgment; and it appearing that no stay bond had been executed by Richard H. Ware, all proceedings consequent upon that assumption, as well as the delivery bonds and executions issuing upon their forfeiture were accordingly quashed.

Richard H. Ware alone petitions for a certiorari, and though the writ issues in his name alone, Bennett Ware is treated as a defendant in the Circuit Court, and they are both made defendants to the writ of error.

MOODY, for the plaintiff in error.

CHILTON, for the defendant.

COLLIER, C. J.—In Gray and another v. Dennis, at the last term, it was decided that a certiorari will not be awarded to remove a case from a Justice of the Peace to the County or Circuit Court, upon an allegation that an execution issued on a judgment there rendered, was irregular. But neither in that or the previous decision of Boyd v. Woodfin, [3 Stew. Rep. 357,] did it appear that a motion had been made to quash the execution; and not only the execution was suspended in its operation, but the judgment itself was removed to the appellate Court. The case before us is distinguishable from those cited in this—here the judgment of the Justice is not complained of, nor is he inhibited pending the case in the Circuit Court

Gilleland, use, &c. v. Ware et al.

from issuing a proper execution thereon; here the party prejudiced by the execution complains of its irregularity, and by the Justice endeavors to have it vacated, and upon an order sustaining it, asks the judgment of the Circuit Court. Under these circumstances, was the certiorari properly allowed?

In the *Mobile Cotton Press, &c. v. Moore & Magee*, [9 Porter's Rep. 679,] it was held to be well settled at common law, that Courts of judicature possess a controlling power over the acts of their officers and process, which it is their duty to exercise in advancement of justice. This rule does not seem to be confined to any court, but pertains to all, without reference to the extent of their jurisdiction. It is then competent for a Justice of the Peace to vacate, by an order for that purpose, an execution issued by himself; the more especially if it has not been satisfied by a voluntary payment, or the levy on and sale of property; whether he could act in these cases so as to affect the rights of other persons not parties to the process, we need not inquire.

If the only evidence of Richard H. Ware being the surety of Bennett Ware in the stay bond, was the memorandum made by the Justice on his docket, then he should not have been a defendant in the first execution, and as to him it was unauthorized. But that execution was not levied on his property, and consequently did not prejudice him. B. Ware could not have been injured by having another person associated with him as a defendant, and the great indulgence extended to the proceedings of Justices of the Peace, should have prevented the entertainment of a motion by him to quash the execution. It may then be conceded that the first execution should have been set aside as to R. H. Ware, yet as it spent its force without affecting him, either directly or consequentially, except so far as he voluntarily bound himself as the surety of the proper defendant in a delivery bond, it should not afterwards be vacated at his instance as to Bennett Ware. From this view it follows, that the delivery bonds, if unobjectionable in themselves, (and no defects are pointed out,) furnish a sufficient warrant for the executions which issued upon them respectively, and that the judgment of the Circuit Court is erroneous.

The most regular, (if not the only,) mode of obtaining the revision of an order of a Justice of the Peace, quashing or re-

fusing to quash an execution, is by a certiorari. In such a proceeding the Judge or Court awarding the writ, may make such an order in regard to the bond to be executed, as would afford to the opposite party an ample security for his debt and cost. An appeal as provided by the statute would not perhaps lie, as this remedy contemplates a judgment by the Justice upon suit brought in the usual form. And the extraordinary remedies by *mandamus*, &c. could not be prosecuted if a certiorari be allowable; at best they are expensive, and under some circumstances could not reach the justice of the case.

We have only to add that the judgment of the Circuit Court is reversed and the cause remanded.

ELLIOTT AND PERKINS v. MAYFIELD AND WIFE.

1. The act of 1832, [Aik. Dig. 253,] which authorises an execution to issue against the surety of an executor to his official bond upon a return of "no property found," to an execution issued on a decree of a County Court against the executor, was intended to embrace bonds executed prior to its passage, but was not intended to retroact upon decrees of the Orphans' Court rendered prior to the passage of the law. The act is constitutional.
2. E. & W. being appointed executors of S. qualified as such, and entered into the following bond: "Know all men by these presents, that we, Edward B. Elliott and Thompson Windham, executors of John Spencer, Hardin Perkins and Enoch Elliott, as sureties for said Edward B. Elliott, and William Glover and John Cummings as sureties for Thompson Windham, are held and firmly bound unto Hume R. Field, Judge of the County Court of Tuscaloosa county, and his successors in office, in the penal sum of thirty thousand dollars, to which payment well and truly to be made, we and each of us do bind ourselves, our heirs, &c. firmly by these payments. Sealed with our seals and dated this 24th January, 1827.

Now the condition of this obligation is such, that, whereas, the above bound Edward B. Elliott and Thompson Windham, have been duly appointed executors of the last will and testament of John Spencer, deceased—Now if the said Edward B. Elliott and Thomas Windham shall well and truly perform all the

Elliott and Perkins v. Mayfield and Wife.

duties which are or may be by law required of them, as such executors, then the above obligation to be void, else to remain in full force and virtue.

Witness our hands and seals the date above written.

E. B. ELLIOTT, [seal.]

THOMPSON WINDHAM, [seal.]

H. PERKINS, [seal.]

ENOCH ELLIOTT, [seal.]

W. Y. GLOVER, [seal.]

THOMAS CUMMINGS, [seal.]

Held—first, that as it was clearly the intention of the sureties to this bond not to bind themselves jointly for both executors, but severally for each, the bond would operate as the several bond of each executor, with his sureties, and was in effect the same as if separate bonds had been executed—second that there was nothing in the condition to contradict this intention, or to show that it was intended as a joint bond—third, the mere fact that the bond appears on its face to have been executed by *Thomas Cummings* instead of *John Cummins*, will not render the bond void as to the other parties who executed it.

ERROR to the County Court of Tuscaloosa.

This was a petition for a supersedeas to an execution issued from the Orphans' Court of Tuscaloosa, by the defendants against the plaintiffs in error, which was dismissed by the Court.

The record discloses that the last will and testament of John Spencer was admitted to probate on the 24th January, 1827, by which he appointed William M. Marr, Edward B. Elliott and Thompson Windham his executors—that on the same day Elliott and Windham entered into the following bond:

“Know all men by these presents, that we, Edward B. Elliott and Thompson Windham, executors of John Spencer, Hardin Perkins and Enoch Elliott, as sureties for said Edward B. Elliott, and William Glover and *John Cummings*, as securities for Thompson Windham, are held and firmly bound unto Hume R. Field, Judge of the County Court of Tuscaloosa county, and his successors in office, in the penal sum of thirty thousand dollars, to which payment well and truly to be made we, and each of us, do bind ourselves, our heirs, &c. firmly, by these presents, sealed with our seals, and dated the 24th day of January, 1827.

Now the condition of the above obligation is such, that, whereas, the above bound Edward B. Elliott and Thompson Windham have been duly appointed executors of the last will

Elliott and Perkins v. Mayfield and Wife.

and testament of John Spencer, deceased—Now if said Edward B. Elliott and Thompson Windham shall well and truly perform all the duties which are, or may be, by law required of them, as such executors, then the above obligation to be void, else to remain in full force and virtue.

Witness our hands and seals the date above written.

E. B. ELLIOTT. (seal.)

his

THOMPSON X WINDHAM, (seal.)

mark.

H. PERKINS, (seal.)

ENOCH ELLIOTT, (seal.)

W. Y. GLOVER, (seal.)

THOS. CUMMINGS, (seal.)

Attest, H. T. ANTHONY, Clerk.

On the 5th May, 1828, Thompson Windham resigned his trust in the following words:

“I do hereby refuse to act any longer as the executor of John Spencer, deceased, and to continue any longer as the security of William Elliott, as executor of said estate. 5th May, 1828.

THOMPSON WINDHAM.

Thereupon the Court ordered that he be removed from the appointment of executor of the estate.

On the 14th January, 1831, a settlement was made of the accounts of William Marr and Edward B. Elliott, as executors of the estate of John Spencer, deceased, and a decree rendered in favor of each of the heirs for the respective amounts due them in the hands of the executors. Among which is the decree in favor of Louisa Spencer, (wife of defendant in error,) for seven hundred and eleven dollars ninety-seven cents, against Edward B. Elliott.

On the 27th of August, 1838, execution issued on said decree, pursuant to an order made on a *scire facias* against Edward B. Elliott, which was returned “no property found,” and on the 19th November, 1841, an execution issued against the plaintiffs in error as the sureties of Edward B. Elliott, for the amount of the decree.

To quash this execution the plaintiffs in error filed their pe-

tition in the County Court, which at the hearing was dismissed by the Court, and from which judgment this writ of error is prosecuted. The assignments of error are—

1. The executor's bond is void or inchoate, because executed by Thomas Cummings and not John Cummings.

2. The bond being joint and several, was discharged by the release of Thompson Windham, and if not the execution should have issued against all the co-obligors.

3. The statute authorizing an execution to issue against sureties to an administration bond, cannot operate retrospectively.

4. The statute is unconstitutional.

CRABB & COCHRAN and PARSONS for plaintiff in error.

The act of 1832, [Aik. Lig. 253,] which authorizes execution to issue against the sureties of executors upon an execution returned *nulla bona* against the executors does not apply to this case, because the act was not in existence when the bond was executed or the decree rendered and the act cannot operate retrospectively. [3 Marshall, 138; 1 Kent's Com. 4th ed. 454; Dwarris on Stat. 680; 3 Story on Con. 247, 266, 250; Minor's Rep. 57; 8 Porter, 171; 3 Ala. 145; 7 Johns. 508; 2 Cranch, 272; 3 Call, 238; 5 S. & P. 276; 7 Gill. & J. 205; 15 Mass. 447; 16 id. 270; 9 Wheaton, 728.]

The plaintiffs in error were not, at the issuance of the execution, sureties of E. B. Elliott—

1. Because it was never executed by all the persons who were intended to be parties as shown by the body of the instrument. [17 Mass. 591; 2 Pick. 24; Minor, 103; 4 Watts, 2 Leigh. 157.]

2. Because the supposed bond, if ever valid, being the joint and several obligation of the parties, was released by the resignation, removal and discharge of Windham, one of the co-obligors. [9 Wheaton, 680, 720; 2 Pick. 223.]

If Windham was not released, then proceedings should have been had against him and the other co-obligors, and Windham was a guarantor of all the sureties against injury. [2 Conn. 536; 3 Binney, 126; 2 Brockenbrough, 160, 420.]

That the bond bound all the obligors alike, notwithstanding the recital in the bond that two of the obligors were sureties

for Windham and the other two for Elliott; but that if this does not appear in the obligatory part of the bond, it does in the condition which will control the obligation.

The statute of 1832, is unconstitutional as applied to this case, because retroactive and in disparagement of rights essential to the security of property. [3 Story on Con. Law, 240, 266; Constitution of Ala. Art. 1, §10; 1 Kent's Com. 4th ed. 455, n. c. 2 Ala. Rep. 31; Minor, 57; 17th Johns. 215; 20 id. 105.]

Because, also, it is in violation of the right of trial by jury, and is the exercise by the legislature of judicial power. [Amendments Con, U. S. Article 7; Cons. of Ala. Art. 1, §28; 2 McCord, 55; 2 Ala. Rep. 31; 1 id. 559; 2 Dallas, 304; 2 Stew. 225; Con. of Ala. Art. 2, §1, 2; 7 John. 508; 2 Cr. R. 272; 15 Mass. 447; 16 id. 245; 7 G. & J. 205.]

PECK & CLARK, contra.

The bond in this case must be so construed as to give effect to the intention of the parties. [Willes' Rep. 332, Com. on Con. 37, 38.] The manifest intention of the parties was that Glover and Cummings were to be sureties for Windham, and Elliott and Perkins for Elliott. That it is therefore in effect two bonds, and should be so considered by the Court, as no rule of law forbids it.

The resignation of Windham did not affect the bond as it respected Elliott and his sureties, the plaintiffs in error, as they were only bound for Elliott.

The act of 1832, did not impair the obligation of the contract, it gave a new remedy, but left the obligation the same. [5 S. & P. 276, 280; 1 Bibb, 567.]

The true distinction is between those laws which have reference to the nature, essence and construction of a contract, and those which have reference to the mode of enforcing it. [Story Con. Law, 477; Sturgis v. Crowninshield, 4 Wheaton, 122.]

ORMOND, J.—The counsel for the plaintiff in error, maintain that the bond, which is the foundation of this proceeding, was executed by the plaintiffs in error, with two other persons as joint sureties of both the executors of John Spencer, and that

Elliott and Perkins v. Mayfield and Wife.

the execution should have issued against all the sureties and not against the plaintiffs in error only.

The language of the bond is, "Know all men by these presents, that we, Edward B. Elliott and Thompson Windham, executors of John Spencer, Hardin Perkins and Enoch Elliott, as securities for Edward B. Elliott, and William Glover and John Cummings as securities for Thompson Windham, are held and firmly bound, &c.

We think it very clear that the persons who executed this bond as sureties, did not intend to bind themselves jointly for both executors, but severally for each, as is explicitly stated. The language employed is plain, clear and unambiguous, leaving no room for doubt as to what the intention of the parties was, and as it is the duty of Courts to give effect to the contract as it was understood by the parties to it, this instrument must have the same effect as if separate bonds had been executed, by each of the executors and their several sureties. It would, to be sure, have been more formal if separate bonds had been executed, but we do not think the intention to sever the liability of the sureties, and to limit it to the acts of a particular individual would have been more certainly indicated by that course than by the mode adopted, to which we know of no legal objection.

It is further contended that any ambiguity which may exist in the obligatory part of the bond is removed by the language of the condition which it is supposed shows that the sureties intended to bind themselves jointly, and that if there is any discrepancy between the condition and the obligatory part of the bond the latter must yield to the former.

Although we are by no means disposed to assent to this proposition, we think no such discrepancy exists. The condition in effect, refers to the stipulations in the obligatory part of the bond and declares that if the executors perform the duties required of them by law, that the bond shall be void. It would be a forced and unnatural construction to suppose that it was intended by these general expressions to change the stipulations of the bond so as to make all the sureties bound jointly, for both the executors. The natural and fair interpretation of the condition is, that if each of the executors should perform the

duties required of him by law, the sureties of each should be discharged from the obligation.

It is further insisted that the bond is not obligatory on the plaintiffs in error, because not executed by all the persons who are recited in the obligation as parties to it. This objection rests on the fact that the bond recites that *John Cummings* is one of the sureties of Windham, and the bond appears to have been executed by Thomas Cummings.

The obvious answer to this is, that if it were true as stated, it could not affect the plaintiffs in error, who were the sureties of Elliott, and not bound for the acts of Windham. It is true that if the plaintiffs in error executed the instrument as an *escrow*, to be their bond only on condition it was executed by John Cummings, and Thomas Cummings had been afterwards substituted without their consent, it would not be their bond. But this fact was not put in issue in the Court below, and cannot therefore be made in this Court. For aught this Court can know, the plaintiffs in error may have executed the bond unconditionally and not as an *escrow*. Or the latter may have subsequently assented to the substitution of Thomas for John Cummings; this objection, therefore, cannot prevail, at least in the mode now presented.

The act under consideration, which passed in 1832, is to the following effect: "Whenever any execution shall have issued on any decree made by the Orphans' Court, upon final settlement of the accounts of executors, &c. and is returned by the sheriff "no property found," generally, or as to part thereof, execution may and shall forthwith issue against the sureties of such executors, &c. [Aik. Dig. 253, §40.]

The decree of the County Court upon which the execution in this case issued, was rendered in 1831, and previous to the passage of this law, and it is now maintained that this act is unconstitutional if intended to embrace cases like the present, because the law would then be retroactive in its character, and in disparagement of rights essential to the enjoyment of property.

It is now well understood that the prohibition of the constitution of the United States against the passage by Congress of *ex post facto* laws, applies only to criminal cases. [Calder v. Bull, 3 Dall. 386; Satterlee v. Matthewson, 2 Peters, 300;

Wilkinson v. Leland, id. 627; 3 Story's Com. on Con. 266.] And such is held to be the true construction of a similar clause in the Bill of Rights of this State in the case of Bloodgood v. Cammack, [5 Stew. & Por. 276.]

It is equally well settled that a change in the remedy, or means of enforcing the contract does not impair its obligation. Sturgis v. Crowninshield, 4 Wheaton, 200; Ogden v. Saunders, 12 id. 262; 3 Story Com. on Con. 250.]

Now, so far as the act in question operates on the bond of the plaintiffs in error, its whole effect is to authorize an execution to issue against the surety, upon a return of "no property found," to an execution against the principal, instead of the more tedious process in force when the bond was made, of bringing suit against the surety in the ordinary mode, after the inability of the principal to pay was ascertained.

Of the power of the legislature to pass such a law we entertain not the slightest doubt. The undertaking of the surety was to answer for the default of his principal—this liability the law does not alter or change in the slightest degree—it leaves the rights of the parties precisely as they were, and merely provides a different mode of enforcing them. The law then, merely respects the remedy—a matter which is entirely within the discretion of the legislature, both as it regards existing and future contracts, provided a remedy of some kind is given.

It is further insisted that the act in question impairs the right of trial by jury, which the constitution declares shall forever remain inviolate. [1st Art. §28.]

Executor's bonds and others of that class are executed in the presence of a judicial officer, approved by him, recorded and preserved in the office of the County Court. A very strong presumption therefore arises that these documents are genuine, and that the parties to them are subject to the liability which their execution imports. Upon this natural presumption the legislature has acted, but without intending to deny to any one the right to repel this presumption. If, for example, the execution of the bond were denied, upon an application to a Chancellor, he would direct an issue to be tried by a jury to ascertain that, or indeed any other, fact, which might be open for adjudication, and contested between the parties.

Our legislation affords many similar examples in which bonds are declared *prima facie* to have the force and effect of judgments. In none of them is the right to appeal to a jury, upon a proper case, prohibited by the legislature. Nor can one be supposed in which such a right would be denied by the Courts upon a proper case being presented.

It having been shown that it was within the power of the legislature, to pass laws having a retrospect as it regarded the remedy for the enforcement of contracts, it remains but to inquire, whether it was the intention of the legislature that this law should be retrospective in its operation.

It is certainly true of all laws, that unless the contrary be clearly expressed, it must be intended they are to operate in future, unless a contrary presumption must be made to give effect to the plain design of the legislature. In the language of this Court in the case of Philips v. Gray, [1 Ala. Rep. N. S. 226,] "The future is the appropriate field for legislation, and a statute is never allowed to have a retrospective operation unless clearly so expressed, or unless such implication must be made to give effect to the manifest intent of the legislature."

The act does not, it is true, declare that it shall operate on bonds then executed, but the mischief to be prevented was the delay of suing on the bond of the surety, when by the inability of the principal to pay, ascertained by due course of law, the liability of the surety was fixed. It would be most unreasonable to suppose that in redressing this evil, the remedy was intended to be confined to bonds executed after the passage of the law. Nor has such an interpretation been put upon this or any of the similar laws to be found on our statute book, since their passage; but on the contrary it has always been understood, that they applied as well to bonds executed before as after the passage of the law giving a more summary remedy. Such was doubtless the intention of the legislature, and such must be the effect given to the law.

We do not think, however, that the act was intended to embrace those cases where decrees had been rendered previous to its passage. This would be to give an effect to the decree of the County Court, which it had not at the time it was rendered, and although it might be conceded that the legislature

had such power, we do not think it reasonable that it was in its contemplation. In all cases where decrees at the passage of the law had been rendered, it might have been, and doubtless was, supposed that the remedy by suit on the bond had been resorted to, and to prevent such necessity in future was the design of the law. The reasoning therefore which applies to the bond, loses much, if not all its force, when applied to the decree. In a word, there is nothing either in the subject matter on which the law was to operate, or the mischief to be prevented, to repel the presumption which applies to all laws that they are intended to operate in future. The case of the Commonwealth v. Hewit, [2 H. & M. 181,] is very similar to this case. An act had passed declaring that when property taken by a sheriff remained unsold at the time of his death, the Clerk should issue a writ of *venditioni exponas* to his successor.

The Court held that the law could not have a retrospect so as to reach cases happening before its passage; notwithstanding the preamble recited that, whereas, doubts existed as to the law, &c. [See also 2 Ala. Rep. 54, and cases there cited.]

From the view we have taken of the case, it becomes unnecessary to examine some of the questions presented in argument. The conclusion we have come to is decisive against the judgment of the County Court. As there was no authority to issue this execution, it should have been quashed.

The judgment of the County Court must be therefore reversed, and a judgment be here rendered quashing the execution.

HOPKINS v. LAND.

1. In general it is irregular to sue out a second execution when a sufficient levy has been made which remains undisposed of, in consequence of a forthcoming bond; but such a bond is not a satisfaction of the judgment, and if the condition is broken, the plaintiff may sue out a new execution on the judgment, or against the defendants to the same and the sureties on the bond. *Quere*, how far the lien of the judgment or first execution is continued or destroyed.
2. By statute, a plaintiff is authorized to sue out more executions than one, but at his own cost; whenever therefore a forthcoming bond is forfeited and it is necessary to run executions to different counties, he may sue out one execution against the defendants to the judgment, and another against them and the sureties to the bond.

WRIT of Error to the Circuit Court of Sumter county.

Action of trespass, under the statute to try title. Verdict and judgment in favor of the defendant.

At the trial the plaintiff read in evidence a judgment obtained at the October term, 1837, of said Court, by Isaac C. Snedecor against Cornelius Rain, for \$712 96. This judgment was superseded by writ of error, and was affirmed at the June term, 1838, of this Court, against Rain, and judgment also given against William Johnson and Cleaveland Robb, his securities on the writ of error bond. A writ of *fi. fa.* issued on this affirmed judgment against all the defendants to it, on the 15th April, 1839, which on the same day was received by the sheriff of Sumter.

This writ was endorsed by the Clerk that a *fi. fa.* on the same judgment, on a forfeited forthcoming bond issued the same day to Mobile county; and the payment of that would be a supersedeas to the one thus indorsed. The writ to Sumter county was levied on the tenements sued for, and under which they were sold as the property of Cleaveland Robb, on the 5th of August, 1839, to the plaintiff. It was also in evidence that Robb lived in Sumter county, and Rain and Johnson in Mobile. The plaintiff then offered to read the sheriff's deed for the premises sued for, and purchased under said execution.

The defendant objected to the reading of this deed, and

showed that an execution was issued on the 5th of March, 1839, on the affirmed judgment against Rain, Robb and Johnson, which was received by the sheriff of Mobile county on the 11th of the same month, and on the 23d levied on fifteen head of horses and two coaches, and other property, as the property of Rain, for which a forthcoming bond was taken from Rain, with one Maxwell as security; this was returned "forfeited," with the execution. After the return of this execution, another was sued out against Rain, Maxwell, Robb, and Johnson, on the same day as that under which the sale was made of the premises sued for, and was indorsed that it was sued on a forthcoming bond, and therefore no security of any kind should be taken.

The sheriff of Mobile returned to this execution that he had levied the same on the 19th April, 1839, on two slaves as the property of Johnson; that the same, on the 6th May, were claimed by one Walker, trustee of Mrs. Johnson, and the sale forbid; that the plaintiff was apprised by the sheriff that the slaves were claimed and indemnity required; and that this being refused the slaves were released.

The Court sustained the objection to reading the deed, and the plaintiff excepted.

SMITH, for the plaintiff in error, insisted that the exclusion of the deed was erroneous, because, under the statute, [Digest, 159, 160,] the plaintiff is permitted to sue out two executions at the same time, to different counties. Having this right, the omission to insert the name of Maxwell, the security of Rain to the forthcoming bond, was at most an irregularity, which ought not to avoid the sale. [Boren v. McGehee, 6 Por. 432.] At all events the regularity of the sale cannot be collaterally impeached. [Campbell v. Wyman, 6 Porter, 219; University v. Keller, 1 Ala. Rep. N. S. 406.]

HAIR, contra, contended that by the levy of the first *fi. fa.* on property sufficient to pay the debt, the judgment was discharged—a new security, provided by the statute, was given to the plaintiff, and the old securities discharged.

Independent of this, the forthcoming bond having been returned forfeited, the judgment became merged, and no execu-

tion could properly issue on it. [Tucker's Comm. 360, 361 ; 3 Rand. 490 ; Bondurant v. Buford, 1 Ala. Rep. N. S. 357 ; 2 Howard, 853 ; 5 Howard, 235, 677.]

GOLDTHWAITE, J.—1. It would be very difficult to distinguish the principle which ought to govern this case, from that decided in *Boren v. McGehee*. [6 Porter, 432,] even if we conceded that the levy under the first *fieri facias*, with the execution of the forthcoming bond by Rain, was a satisfaction of the judgment ; but as the principle contended for by the defendant, if correct, is one of extensive bearing, we shall give it our consideration.

It may be admitted, that in general, it is irregular to sue out a second execution when a sufficient levy has been previously made, and remains undisposed of ; but such is not the matter now to be examined, for in this case it appears that the levy was ineffectual, in consequence of the forfeiture of the condition of the forthcoming bond. Our statutes, though different in some respects from the enactments in Virginia and Mississippi, have the same general objects in view ; it not unfrequently happens, however, that different constructions grow up in different States under statutes very similar.

When these regulate the course of proceedings in Courts, and do not effect the end to be attained, the reason for the difference of construction is sometimes found in the fact that the course of proceeding is intimately interwoven or otherwise connected with other matters of practice merely. In the States we have named, the practice seems to have prevailed of considering forthcoming bonds as a satisfaction and consequently an extinguishment of the judgment. Although in Virginia it never has been decided, so far as we can ascertain, that the judgment is merged in the bond, yet, from some expressions dropped by the Judges in the earliest cases, the practice has subsequently prevailed of compelling the plaintiff either to set aside the forthcoming bond, if defective, or to move for judgment on it if regular. [Taylor v. Dundas, 1 Wash. 92 ; Downman v. Chimm, 2 id. 189 ; Randolph v. Randolph, 3 Rand. 490.] In the latter case, however, the Judges, whilst they admit the practice as stated, deny that the bond is in law either a satisfaction or a discharge. The Courts of Mississippi seem to have

adopted the Virginia practice, as their statute is, in substance, a transcript of that of the other State. It may also be remarked that the decisions of the Courts of Kentucky are founded on the Virginia statute, and consequently merely pursue the rules supposed to be indicated in the cases reported by Judge Washington.

Formerly our legislation on this subject was very similar to that of Virginia, and it was then necessary to move for judgment on a forfeited forthcoming bond, [Laws of Ala. 296, §9,] but this was changed in 1812, and the plaintiff was permitted to sue out execution on the bond without the formality of a judgment. Before entering upon the examination of our own statute, it is proper to observe that this mode of giving a summary effect to bonds, has been extended to a large class of cases and with respect to them the decisions of our courts have been general, that writs of error will not lie to set aside the execution; but it has uniformly been held that errors can be reached by *supersedeas* only. Whether important questions with respect to liens created by these bonds, or the executions issued on them, are matters with which, at present, we have no concern.

Our statute, after declaring it to be the duty of the sheriff to permit the property levied on to remain with the defendant, when a proper bond is executed, directs, on the forfeiture of the condition, that it shall be the duty of the sheriff, &c. to return the bond and execution within ten days thereafter, to the Clerk of the Court, with the necessary indorsement thereon, of forfeiture. It then directs that the Clerk, within five days afterwards shall issue execution thereon against all the obligors therein; on this execution he is to indorse that no security of any kind is to be taken. [Dig. 171, §64, 66.]

The practice under this statute is believed to be to permit any defendant to enter into the bond, and to issue the execution against all the defendants, together with the sureties executing the bond. Now if the Virginia decisions were to give the rule, it is obvious, either that all the defendants must join in the bond, though one only is affected by the levy; or that the plaintiff will lose his remedy against some of the defendants if one only is allowed to give the bond.

This seems unreasonable, and we prefer to adhere to what

Hopkins v. Land.

is believed to be the established practice of our State ; and this the rather, because we think that the practice is entirely consonant to reason, and well supported by all the analogies of the law.

It never has been pretended that the rights of the plaintiff are affected by the bond, (we again exclude the questions of lien,) when its condition has been complied with ; and we cannot perceive why a non-compliance should impose the hardship of resorting to a new remedy. The defendant, when the condition of the bond is not performed, has received all the benefit, and more, that the statute intended to confer on him.

The bond, however, remains for the indemnity of the plaintiff, and although a summary remedy is given to him, there seems to be no reason why he may not waive it if he will. If the defendants are not prejudiced, they ought not to complain. Such are the reasons which induce us to conclude that the bond is not an extinguishment of the judgment ; and that the *plaintiff*, at his election, may sue out an execution on it, or have his execution against the sureties to the bond as well as against all the defendants. This view shows that the execution under which the land was sold was regular, it being within the election just adverted to.

But it may be said that the election was before made to take out execution upon the bond, and consequently as the second execution after the forfeiture of the bond, did not follow the election, that was void. This, however, is not the case, for our statutes authorize the plaintiff to sue out more executions than one, at his own cost. [Digest, 159, §2.] When more executions than one are issued, they each are independent of any other, and if one is irregular it cannot have the effect to avoid one that is good ; but we do not conceive it at all necessary that the plaintiff should continue his execution on the bond, if from any cause he chooses to cease his pursuit of the sureties. The bond is not made a judgment by the terms of the statute, and it would be exceedingly pernicious if the plaintiff, after ascertaining the bond was defective as a statutory bond, should not be permitted to pursue his judgment, because he has inadvertantly omitted to examine the defective bond. From the facts stated, we are satisfied that neither execution is shown to be irregular.

Dearing, Sink & Co. v. Smith & Wright.

It seems scarcely necessary again to repeat, that we have purposely omitted all examination or consideration of any questions affecting the continuance or discharge of the general lien of the judgment or execution.

Let the judgment be reversed and the cause remanded.

DEARING, SINK & Co. v. SMITH & WRIGHT.

1. The appearance of a defendant will dispense with the service of process upon him.
2. The recital in a judgment that the defendant *says nothing in bar or preclusion of the plaintiff's action*, amounts to the withdrawal of the pleas which he had previously filed.
3. The statute having dispensed with proof that individuals suing as a firm were partners, unless the fact is put in issue by plea in abatement; where the making a promissory note is denied, by a party charged as a member of a partnership, the same may be read to the jury without any additional proof, and then its genuineness, or legal obligation, must be shown.
4. On a demurrer to evidence all reasonable presumptions are made against the party demurring; and the Court is not bound to render judgment in conformity with what should have been the verdict of the jury, *but with what it legally could have been*.
5. Where two persons named D. were sued as partners with S. one of them with S. submitted to a judgment by *nil dicit*, and the other denied making the note sued on; on the trial of the cause a witness stated that "he had always understood that Mr. D. was a member of the firm,"—*Held*, that this evidence was sufficient on a demurrer to evidence to authorize the inference that the Mr. D. who had pleaded was the one to whom the witness referred.
6. Where an objection is made to the competency of testimony *en masse*, if part of it is admissible, the Court, without undertaking to distinguish it, may overrule the objection *in toto*.
7. When some of the defendants suffer judgment by default, and one of them pleads to issue, no judgment should be entered against the others until the jury have returned their verdict, then it should be entered jointly against all; but if a judgment is rendered against the former, and after verdict a judgment in continuation of the entry, is rendered against the latter, it will be considered as a mere clerical misprision amendable under the act of 1824, "to regulate pleadings at common law."

WRIT of Error to the County Court of Tuscaloosa.

The defendants in error brought an action of *assumpsit* against the plaintiffs on a promissory note for the sum of one hundred and ninety-four dollars and seventy-five cents, dated the 20th December, 1838, and payable four months after date, at the Bank of the State of Alabama. The writ is returned executed on two of the defendants, to wit: James H. Dearing and Philip J. Sink; as to the other, Wiley J. Dearing, there is no return, but on the face of the process, as well as in the declaration, they are all described as copartners and merchants, trading under the style of Dearing, Sink & Co.

Sink appeared and pleaded, *non assumpsit*, failure of consideration, payment and set-off. James H. Dearing pleaded that he did not make or execute the note declared on, nor did he authorize any other person to make the same for him; which plea was duly verified by affidavit.

A judgment by *nil dicit* is rendered against Sink and W. J. Dearing, for the amount of the note, with interest and costs, and execution therefor directed to issue. Immediately following which, and in continuation thereof, is a judgment rendered against James H. Dearing for the amount of the note, with interest and costs, on a demurrer to the plaintiff's evidence.

The evidence demurred to is—

1. The deposition of F. P. Betts, of New Jersey, who states that he always understood that Dearing, Sink & Company were copartners in business. On the 17th day of September, 1835, Dearing, Sink & Co. purchased of Smith & Wright a bill of goods, and gave in payment of the same their note due 31st August, 1836, for six hundred and sixty dollars and fifty cents. A part of that note has been paid, leaving a balance of one hundred and ninety-four dollars and seventy-five cents, due to Smith & Wright on the 20th April, 1839, for which balance Dearing, Sink & Co. gave their note, which is still unpaid. The note last given was signed by Mr. Sink, in Tuscaloosa, on the 20th day of December, 1838, as near as the witness can recollect in the presence of Mr. Dearing.

2. The plaintiffs' counsel also testified that he had been informed by Mr. Sink, one of the defendants, that the note in question was signed by him, and that he several times promis-

Dearing, Sink & Co. v. Smith & Wright.

ed to pay it. Witness had always understood that Dearing, Sink & Co. were partners, but did not know whether there had been a dissolution of the firm. Mr. Dearing he had understood was a partner.

3. The note declared, which is as follows:

Tuscaloosa, 20th Dec. 1838.

\$194 75

Four months after date, we promise to pay Smith & Wright, or order, one hundred and ninety-four 75-100 dollars, for value received, negotiable and payable at the State Bank of Alabama, at Tuscaloosa, being a balance due us from the old house of Dearing, Sink & Co. Due 20th 23 April, 1839.

DEARING, SINK & Co.

It appears from the bill of exceptions in the record, that the defendants below excepted to the reading of the deposition adduced by the plaintiffs, as well as the testimony of the plaintiffs' counsel, and the promissory note, all of which was set out in the demurrer to evidence.

HUNTINGTON, for the plaintiffs in error. The judgment entry it is true is joint against all the defendants, but the damages are severed. The correct practice is, where some of the defendants plead and others do not, to assess the damages by the jury who tries the issues; there is an entry of a stay of judgment against the latter until the jury return their verdict upon the issues. [Tidd's Practice, 670-1.] Such is the English practice, but under our statute the clerk may assess damages against those not pleading where the cause of action is a promissory note, &c. Here, although there is but one entry, yet executions may so issue as to recover a double satisfaction, viz: against W. J. Dearing and Sink, and also against J. H. Dearing. Such a judgment cannot be sustained.

General reputation is inadmissible to establish the fact of partnership. [Carter, Hogan and Plowman v. Douglass, 2 Ala. Rep. 499; McPherson v. Rathbone, 11 Wend. Rep. 96; Holliday v. McDougal, 20 Wend. Rep. 81; 22 Wend. Rep. 264; Whitney v. Sterling, 14 John. Rep. 215; Gowan v. Jackson, 20 id. 176; Bryden v. Taylor, 2 H. & Johns. Rep. 396; Brown v. Crandall, 11 Com. Rep. 92; Goddard v. Pratt, 16 Pick. Rep. 412, 433.]

The evidence of the witnesses was insufficient, and the note was inadmissible. [Bailey on Bills, 492-3-4; Powell v. Brown, 3 Johns. Rep. 104; Chauvin v. Labarge, 1 Missouri Rep. 556; Clark v. Small, 6 Yerger Rep. 418; McGregor, Darling & Curtis v. Cleaveland, 5 Wend. Rep. 475; Roberts v. Rowan & Co. 2 Harrington's Rep. 314; Bell v. Rhea, Conner & Co. 1 Ala. Rep. N. S. 83; Lewis v. Post & Main, id. 65; Mauldin v. Branch Bank at Mobile, 2 id. 502.]

He also cited Fowlks & Co. v. Baldwin, Kent & Co. 2 Ala. Rep 705; Catlin, Peoples & Co. v. Gilder's ex'rs. 3 id. 542; McCollum & Capel v. Hogan ex'r. &c. 1 Ala. Rep. N. S. 515; Towns & O'Brien v. Alford & Butler, 2 id. 378; Craddock v. Craddock, 3 Litt. Rep. 77.

J. J. PORTER, for the defendant. The judgment may be defective in point of form, yet as informality can't prejudice any one, it is not reversible. [1 Porter's Rep. 15; 3 id. 226; 4 id. 160; 1 Ala. Rep. 182.]

The service of process on either one of the co-partners, was, under our statute, equivalent to service on all; but if it were otherwise, the judgment would still be good, for it expressly recites that W. J. Dearing and Sink, appeared and suffered judgment by *nil dicit*. [2 Ala. Rep. N. S. 705.] As to the pleas of Sink, the legal intendment is, that they were withdrawn. [3 Stew. Rep. 339; 8 Porter's Rep. 469; 9 Porter, 145; 1 Ala. Rep. 515; 2 id. 337.]

The note, without any proof of its genuineness, or legal obligation upon J. H. Dearing, was admissible. [1 Ala. Rep. 83; 3 id.]

In respect to the deposition of Betts, it was admissible, so far as the matter was concerned, and the objection to the form of the interrogatories came too late. [1 Starkie Ev. 270; Pick. Rep. 310; 3 Binn. 130; 4 Conn. (2d series,) 275; 10 S. & R. Rep. 63; 18 Maine's Rep. 128; 1 Penn. 305; 7 Greenl. Rep. 181; 4 Hen. & M. Rep. 88; 15 Pick. Rep. 56.]

The demurrer to the evidence was properly overruled. The legal intendment is most strong against the party demurring. [7 Porter's Rep. 540; 3 S. & R. Rep. 416; 1 Wheat. Rep. 179; Carson v. State Bank at this term; 2 Porter's Rep. 261;

COLLIER, C. J.—1. It is true that it does not appear from the record that the process was served on Wiley J. Dearing, but the want of it was waived by his voluntary appearance; a fact which is expressly affirmed by the judgment entry.

2. Although the record does not discover a formal withdrawal of the pleas, that were pleaded by the defendant, Sink, yet the recital in the judgment, that he said nothing in bar or preclusion of the plaintiffs' action, whereby the same was undefended, certainly amounts to a waiver of them; for such a recital is incompatible with the notion that the pleas were insisted on. Even conceding that the filing of a plea requires it should be disposed of by the Court, where it is not *expressly* withdrawn by the defendant, and still it must be inferred from the statement, that he said nothing in bar or preclusion, &c., that he withdrew all defence to the action.

3. The fifth section of the act of 19th January, 1839, "To regulate judicial proceedings," enacts, "That where the plaintiff shall bring suit as a firm, or copartnership, it shall not be necessary for proof to be made, that the individuals named as plaintiffs constitute the members of the firm, unless the defendant puts the same in issue by plea in abatement." In this case the only plea interposed is the general issue; and consequently no proof was necessary to show that the three persons suing under the style of Smith & Wright were members of that firm. Nor was it important to prove that the defendants were *prima facie* partners, doing business in the name in which the note was executed, in order to make it admissible evidence. If the note was correctly described in the declaration it was entirely regular to read it to the jury; in fact such a course would be proper to enable the plaintiff to proceed understandingly with evidence to make out his case. [Bell v. Rhea, Conner & Co. 1 Ala. Rep. 83.]

4. The most important inquiry is, does the evidence demurred to, sustain the judgment against James H. Dearing? In Carson v. The Bank of the State, at this term, it was held, that upon a demurrer to evidence the Court is not obliged to pronounce a judgment in conformity to what *should have been the verdict of the jury upon the issue*, but to render a judgment against the party demurring, if the jury *could legally* have returned such a verdict, on the evidence. [See also,

Dearing, Sink & Co. v. Smith & Wright.

Young v. Foster, 7 Potter's Rep. 426.] *Further*, in the demurrer to evidence, it appeared that the proper officers of the Bank stated, that though they had no recollection of the fact, as connected with the bill sued on, yet they believed, and had no doubt, from the general course of business in the Bank, that notice of the non-payment of the bill was deposited in the post office, directed to the drawer. This Court held, that the jury might properly infer that the usual course of business in the Bank was such as to warrant the belief deposed to by the witnesses; and if the party against whom such evidence is offered neglects to inquire what is the course of business that is usual, he cannot be heard in asserting that the evidence proves nothing.

So in the United States Bank v. Smith, [11 Wheat. Rep. 171,] it is said, that "every thing which the jury could reasonably infer from the evidence demurred to, is to be considered as admitted. The language of the adjudged cases on this subject is very strong, to show that the Court will be extremely liberal in their inferences, where the party by demurring will take the question from the proper tribunal. It is a course of practice, generally speaking, that is not calculated to promote the ends of justice." The question in that case was, whether it could be inferred from the evidence, that the defendant, who was sued as the indorser of a promissory note, resided at Alexandria. The Notary Public testified, that on the day the note fell due, he presented it at the store of the maker and demanded payment of his clerk, who replied that Mr. Young, (the maker,) was not in, and he would not pay it; and that on the same day, he put in the post office a notice of non payment, addressed to the defendant at Alexandria. The Court say, "the jury would undoubtedly be warranted to infer from this evidence, that the defendant's residence was in Alexandria. If that was not the fact, this case is a striking example of the abuse which may grow out of demurrers to evidence. For a single question to the witness would have put at rest that point one way or the other, if the least intimation had been given of the objection. It was manifestly taken for granted by all parties, that the defendant lived at Alexandria. And if a party will, upon the trial, remain silent and not suggest an inquiry which was obviously a mere omission on the part of the plain-

Dearing, Sink & Co. v. Smith & Wright.

tiff, a jury would be authorized to draw all inferences from the testimony given, that would not be against reason and probability."

Let us now consider the evidence in the record with a reference to the principles and reasoning of the cases cited. The recollection of the witness whose deposition was read by the plaintiffs below, that "Mr. Dearing" was present when the note was signed by Sink, might, in the discretion of the jury, be taken as referring to either of the Mr. Dearings, who were alledged to be members of the firm of Dearing, Sink & Co. and upon the demurrer to evidence must be understood to point to James H. Dearing; upon the principle that all inferences shall be made most strongly against the party demurring. But if the deposition were thrown entirely out of view, we think the evidence of the plaintiffs' attorney is quite sufficient to have authorized the judgment of the County Court. The evidence of this witness was given *ore tenus* on the trial of the issue taken to the plea of James H. Dearing, and after his co-defendants had submitted to a judgment by *nil dicit*. That witness stated that he had always understood Dearing, Sink & Co. were partners, whether there had been an actual dissolution of the partnership he did not know; and he had understood Mr. Dearing was a member of the firm. Which of the Mr. Dearings? Doubtless him who had denied that he was a joint maker of the note in suit, and not the other, who had submitted to a judgment; for as to the latter, the fact whether he was a co-partner was not litigated.

It is however argued that the witness does not testify of his own knowledge that James H. Dearing was a partner of the house of Dearing, Sink & Co. but merely from general reputation or rumor. We do not so regard his evidence. He says, "he had understood," &c. Now "understood" is the preterit of *understand*, a verb of very extensive signification, and which, among other things, means *to learn, or to be informed*. When the witness says, in effect, that he has learned or been informed that Mr. Dearing was a member of the firm, it cannot with propriety be assumed that his information was derived from rumor, but a jury might well infer that he had learned it from an authentic and satisfactory source, even from the party

himself; and upon the authority of the cases cited, the Court would be bound so to intend.

5. The objection to the admissibility of the evidence was not made to any particular question, or answer, of either of the witnesses, but to the testimony *en masse*. It is not denied by the counsel for the plaintiffs in error, that a part of the testimony of each witness is unobjectionable; this being the case, the Court was not, according to a well settled rule, bound to sift the evidence and reject that which was inadmissible. The party objecting, should point particularly to so much as he would have excluded from the jury.

6. The judgment against Sink and W. J. Dearing should not have been entered until the issue as to their co-defendant was tried and upon a verdict being returned against him, then a joint judgment should have been rendered against all the defendants; against the former by *nil dicit*, and as to the latter upon verdict. This course was not pursued, but a judgment is rendered against S. and W. J. D. and then in continuation follows a judgment for the same amount against J. H. D. These cannot be regarded as judgments wholly disconnected with each other, or the writ of error would be dismissed for a misjoinder of plaintiffs. The irregularity must be considered a mistake of the Clerk, and is provided for by the first section of the act of 1824, "To regulate pleadings at common law," [Aikin's Digest, 266,] which is as follows: "No cause shall be reversed by the Supreme Court, or any Circuit Court, for any miscalculation of interest or other clerical misprision in entering judgment, so as to give costs to the plaintiff in error; but in all such cases the Supreme Court may order the judgment to be amended at the cost of the plaintiff in error." It was clearly competent for the plaintiffs in error to have obtained an amendment of the judgment on motion to the County Court; and we now direct the judgment to be so amended as to make it conform to what we have stated to be the law. And the plaintiffs will be charged with the costs of this Court.

FOSTER v. GOREE.

1. Where a deed made to secure a surety to a debt in bank, payable by instalments, provided that if the trustee named in the deed should fail or refuse to act, that the *cestui que trust* might appoint another to act in his stead—and the trustee in the deed failing to act upon the happening of the first default, an appointment was made of a trustee who took possession of the trust estate, but the instalment being paid redelivered the property to the makers of the deed, and upon the happening of another default, another person was appointed trustee, who took possession of the property and sold according to the terms of the deed—Held,

1st. That the power was not exhausted by the first appointment.

2d. That as the deed did not require such appointment to be in writing, and the property to be sold under the deed was personal property, the appointment might be made by parol.

ERROR to the Circuit Court of Tuscaloosa.

Trover, by the plaintiff against the defendant in error, for a slave.

Upon the trial the plaintiff offered in evidence a deed of trust made by Samuel Miller and James G. Addison to secure the plaintiff as surety to a note payable in Bank, which deed contained the following clause :

“ If said Andrew B. Brown, trustee, should fail or refuse, from absence or any other cause, to execute this trust, it shall be in the power of the said parties of the third part to appoint another trustee in his stead, who, when so appointed, shall be invested with all the duties, powers and privileges here given to said Brown.”

The plaintiff, to establish a sale to him of the negro sued for under the deed, offered to prove that in consequence of the absence of the trustee named in the deed, the party of the third part had substituted by parol another person as trustee, who proceeded to act by taking a portion of the property into possession, on the first default, but delivered up the same on payment of the money for which the default was incurred, and upon a like failing further to act, the party of the third part then substituted by parol, another, by whom the sale of the negro was made pursuant to the deed.

The Court ruled that the deed by its terms, only provided for the appointment of a second trustee upon the happening of the contingency contemplated by the deed, and that when such appointment was made the power was exhausted, and that a further appointment could not be made—the Court further held that such appointment must be in writing, to which the plaintiff excepted. Judgment was rendered for the defendant.

The assignment of error brings to view the charge of the Court.

B. F. PORTER, for plaintiff in error.

HUNTINGTON, contra, cited 15 Johns. 207; 7 Dana, 246; 7 Johns. 9; 11 id. 529; 2 Stewart, 144; 4 Munford, 351; 9 Dana, 380; 8 Porter, 303; Story on Agency, 137, 159; Lewin on Trusts, 465.

ORMOND, J.—Two questions are made at the bar. First, was it necessary that the trustee, who, by the terms of the deed, the *cestui que trust* was permitted to substitute for the original trustee, on his failing to act, should be appointed by writing.

Second—Was the power of appointment exhausted by the first appointment.

These questions are to be answered by the intention of the parties as expressed in the deed. When power to do any act is conferred on another, and the *mode* of its execution is defined, the power can be exercised only in strict conformity with the terms of the grant. [1 Sug. on Pow. 266.] When the power is conferred in general terms, it is an authority to do the act in any mode which the law would sanction or give effect to. In this case, the grant of power to appoint a trustee is in general terms, and as an authority to sell personal property may be given by parol, without writing, it follows that the parol authority conferred in this case was sufficient.

We are also of opinion that the power was not exhausted by the first appointment. The obvious intention of the parties was, that the deed should not fail for want of a trustee, and a trustee was as necessary to save the surety harmless

Wier v. Davis and Humphries.

against the second default as against the first, as therefore the power is not confined by the terms of the deed to the first default, we cannot presume such to have been the intention of the parties, as that would defeat the object in view in making the deed, and prevent it from being any security to the person intended to be benefitted by it.

The intention of the parties doubtless was, that upon the happening of any of the defaults mentioned in the deed, if the trustee appointed by the deed failed or refused to act, the *cestui que trust* might appoint one to act in his place. The power of appointment is given when the *trustee fails or refuses to execute the trust*. This certainly covers the entire deed, and embraces all defaults, unless it can be shown that the trust did not reach to all the defaults.

As, therefore, the deed does not provide that the power to appoint a trustee shall be extinct when once exercised, we cannot infer such to have been the intention of the parties, as it might be destructive of the object the parties intended to provide for.

Let the judgment be reversed and the cause remanded.

WIER v. DAVIS AND HUMPHRIES.

1. In this State it is unlawful for an administrator to sell the personal estate of his intestate at private sale, and if such sale is made, it conveys no title to the purchaser.
2. A *bona fide* purchaser from an administrator, cannot be deprived of his possession in the property sold, by an execution in favor of a creditor against the administrator, to be levied of the goods and chattels of his intestate in his hands, when the execution issues after the sale, although the sale itself is illegal. Such a sale, if accompanied with possession leaves nothing in the administrator but a mere right of action for the slave, and this is not the subject of levy or sale; nor is the property itself in the possession of the purchaser subject to levy.

WRIT of Error to the Circuit Court of Pickens county.

Trial of the right of property to a slave under the statute. The slave was levied on the 10th October, 1840, as the property of the estate of David Archer, deceased, by an execution in favor of Davis and Humphries against Elizabeth Archer, administratrix of David Archer, deceased, commanding the sheriff to levy on the goods and chattels of the intestate in the hands of the administratrix. The lien of the execution attached on the 2d August of the same year.

This slave was claimed by Samuel Wier. At the trial it appeared the slave was in his possession, when the levy was made, and he made title through a purchase from one Fleming, who purchased from the administratrix of Archer, by a private sale, on the 1st of December, 1838. The consideration paid was about seven hundred dollars, which was applied in due course of administration.

It also appeared that the Orphans' Court of the proper county on the 9th October, 1838, made an order that the administratrix should have leave to sell the personal property of the decedent on a credit of six months. There was no evidence showing the sale to have been on a credit of six months—nor of any advertisement in conformity to the statute.

On this state of facts the claimant's counsel requested the Court to charge—

1. If Fleming purchased *bona fide*, upon a full and fair consideration, and this consideration was applied by the administratrix in due course of administration, then the slave could not be condemned to the plaintiff's execution, although the statutory requisitions had not been complied with.

2. If Wier, the claimant, purchased for a full and fair consideration, without notice, that the administratrix had not complied with the statutory requisitions in her sale to Fleming, then the property could not be condemned.

These charges were refused, and the jury were instructed, that unless the administratrix had complied with the statute, which directs the mode by which property of deceased persons shall be sold, no title was conveyed to the purchaser from her, by the sale, although his purchase was without fraud and for a fair consideration. The purchaser from the administratrix having acquired no title by the sale, if thus defective, could

Wier v. Davis and Humphries.

convey none to the claimant, as against the plaintiff in execution.

The claimant excepted, as well to the charge given as those refused.

L. CLARK, for the plaintiff in error, insisted—

1. That the statutes requiring administrators to sell at public sale, and within certain hours, are directory merely. If the requisitions are not complied with, the sale is not void if without fraud. [2 Ala. Rep. N. S. 682.]

2. The administrator is the owner of the assets, and has power to dispose of them. [Story Comm. 543, §579; 2 Wms. on Ex. 609.]

3. Although the immediate vendee of the administratrix may not have got a good title, yet the claimant did. [1 Story Comm. 373, §381.]

4. Although the claimant may not have a good title against an administrator *de bonis non*, yet the sale cannot be avoided at the suit of a creditor, in the mode pursued. [Toll on Ex. 365; 3 Bacon, Title Ex. and Adm'r. 25, 26.]

ELLIS, *contra*, relied on the statute, declaring it shall not be lawful for an administrator to sell at private sale. [Digest, 180, §13; Ventris v. Smith, 10 Peters, 161; 4 Cowen, 718; 8 Wend. 80; Colt v. Lanier, 9 Cowen, 320.]

GOLDTHWAITE, J.—1. Two questions grow out of this case; the first is, whether any title was gained by the purchaser under the sale made by the administratrix? The second is, whether, after such a sale, a creditor can levy an execution on the property in the hands of the purchaser?

The condition, rights and duties of an administrator under our statutes, and by the common law are widely different in many respects; but in none more so than those which regard the disposition of the personal property. By the common law his right to sell this species of property was limited only by his discretion; and a purchaser from him could only be held responsible when charged with notice of a *devastavit*. [See most of the cases collected in Colt v. Lanier, 9 Cowen, 321.] Our statutes, however, have interposed a complete bar to the

exercise of any discretion by the administrator, with respect to the manner of disposing of most kinds of personal estate which belonged to the intestate. They declare that it shall not be lawful for any executor, administrator or guardian, to take the estate at its appraised value, or to dispose of the same at private sale. The sale can only be made after an order of the Orphans' Court, and then only at public sale. This sale is not to commence before twelve o'clock, nor continue longer than the hour of five in the afternoon, of each day. All sales are declared to be null and void which may be commenced and held in any other manner. [Digest, 180, §13, 14.]

After such an emphatic declaration there is no room to doubt that the Legislature intended such sales should be of no validity whatever; and we cannot perceive there is any particular hardship in providing so strictly against the possibility of collusion between an administrator and a purchaser. The conclusive effect of this legislation on unauthorized sales was very fully considered in the case of *Ventris v. Smith*, [10 Peters, 161,] and the Supreme Court of the United States then held, under these identical statutes, that a private and unauthorized sale by an administrator in chief, did not have the effect to defeat the right of a subsequent administrator, *ad colligendum*.

We think it clear, that under these statutes the title of the property may, by proper proceedings, be subjected to the claims of creditors or distributees of the estate; that this administratrix cannot maintain the action, is supposed to be settled by the case of *Pistole v. Street*, [5 Porter, 64.]

2. The other question is one of more difficulty, because the possession of this property was certainly adverse to all the world. It was held by the claimant under a *bona fide* purchase, not from the administratrix, but from one purchasing from her.

We have already shown that the title of the estate was not divested by the unauthorized sale, but though the title may yet be in the estate, it does not follow that a creditor can subject it to sale under an execution. We have never understood that an execution against the goods and chattels of any person could be so used as to transfer a mere title unaccompanied by the possession. It is obvious that such a rule would be liable to abuse from collusive arrangements, by which a person out of

possession, and with a doubtful title would substitute another in his place, clothed with the more imposing title of purchaser under a sheriff's sale. Added to this advantage, the possession itself would be changed by the seizure and transferred to the purchaser.

The relative condition of the parties would be entirely reversed and the unquestioned possession which before was held under a defective title, would be turned into a mere right of action. We apprehend it is well settled that the mere right of action of a defendant in execution to personal property, is not the subject of a levy. [Commonwealth v. Abel, 6 J. J. Marsh. 476; Thomas v. Thomas, 2 Marsh. 430, and cases there cited.]

We have heretofore held that the owner of a mere right of action to personal property, could not transfer this right to another, so as to authorize a suit in the name of the purchaser. [Goodwin v. Lloyd, 8 Porter, 237; Brown v. Lipscomb, 9 Porter, 472.] The chief objection which can be urged against the rule we have stated as settled, is, that an adverse possession may sometimes be simulated; but a reference to the case last decided will show that the *bona fides* of the adverse claim is always a question for the decision of the jury, and where this essential ingredient is wanting, the transfer, whether by sale or by execution will be operative.

The propriety of the rule cannot be better illustrated than by the facts of this case. The sale is illegal, and passes no title, but the purchase money is received and appropriated by the administratrix in due course of administration. It is therefore by no means improbable that the plaintiffs in execution have themselves received a portion of the sum derived from the sale. If suit should be hereafter brought, by a subsequent administrator, to recover this slave, it scarcely admits of question, that in equity, the purchaser would be permitted to show the application of the purchase money, in due course of administration; and to charge the same as a trust fund, to be first reimbursed out of the proceeds of the slave. The same equity would doubtless be allowed if these creditors were seeking to charge the slave, by bill in Chancery, instead of an execution. Neither a subsequent administrator, distributees or creditors, can claim more than to have the slave sold according to law,

Childress et al v. Miller, use, &c.

and its proceeds applied in due course of administration, and if a portion of the proceeds has been applied in advance, their claim exists for the residue only. But if the present judgment is to be supported, none of these just rules can be applied, and the creditors might receive not only the sum raised by the sale of the slave under their execution, but also, a portion of the price paid by the purchaser to the administratrix.

Our conclusion is, that the Circuit Court should have given the second charge requested by the claimant, as it sufficiently placed before the jury the proper question to be decided by them, under the circumstances in proof. The matter to be determined by them was, the *bona fide* character of the claimant's possession, under his purchase, and in this aspect it was entirely immaterial whether the administratrix had pursued the requisitions of the statutes in the sale of the slave.

Judgment reversed and the cause remanded.

CHILDRESS ET AL V. MILLER, USE, &C.

1. The declaration alledged that J. A. C., then Clerk of the steamboat C., for and on behalf of the same, and the owners thereof, made and delivered to, &c. a promissory note, &c.—Held, that this did not amount to an allegation that the note was made under an authority for that purpose; and it could not be intended, from the nature of his employment, that the Clerk was authorized to bind his principals.
2. One who signs a note on behalf of a steamboat and its owners, is a competent witness to show that his principals were indebted to the payee.

The defendant in error declared against the plaintiffs in *assumpsit*, in the Circuit Court of Tuscaloosa. The declaration contains several counts; the first is on a written acknowledgment of indebtednes, and the second is in the common form for goods, wares and merchandize sold and delivered, money lent and advanced, had and received, &c. The first Count is in the following words:

Childress et al v. Miller, use, &c.

“Jacob Miller, who sues for the use of Samuel N. McMinn, by attorney, complains of Thomas B. Childress, Edward L. Smith and Henry N. Allen, (the said Smith & Allen, partners trading under the firm of Smith & Allen,) owners of the steamboat Choctaw, and partners in running the said boat in custody, &c., of a plea of trespass on the case in *assumpsit*, &c. For that, whereas, on the 7th day of July, 1838, at Tuscaloosa, to wit, in the county aforesaid, J. A. Case, then clerk of the said steamboat, for and on behalf of the said steamboat Choctaw and the owners thereof, the said defendants, made and delivered to the said Jacob Miller, a certain note, dated as aforesaid, by which it was acknowledged there was due the said Jacob Miller three hundred and four dollars and sixty-four cents, for services as first Engineer on the steamboat Choctaw, in 1838. By means whereof the said defendant became liable to pay to the plaintiff the sum of money in the said note specified according to its tenor and affect.”

To this count the defendants demurred, but their demurrer was overruled, and thereupon the cause was submitted to the jury, on the plea of *non assumpsit* to the entire declaration. On the trial the defendants excepted to the ruling of the Court. To sustain his action the plaintiff offered in evidence a writing of the following tenor, viz :

§304 64.

Tuscaloosa, July 7, 1838.

Due Jacob Miller, three hundred and four 64-100 dollars, for services as first engineer on the steamboat Choctaw in 1838.

(Signed,)

J. A. CASE, Clerk,

for steamboat Choctaw and owners.

On which writing were the following indorsements: “J. P. Miller,” “\$10—Received on the within note of J. A. Case, Clerk, ten dollars. August 27, 1838.

(Signed,)

J. MILLER.”

To the admission of this evidence the defendants objected, but their objection was overruled, and the writing read to the jury; thereupon they excepted.

The plaintiff then offered as evidence the deposition of J. A. Case, the individual who, as Clerk of the boat, signed the writing. Witness proved the partnership of Smith & Allen, and

that the defendants were all joint owners of the Choctaw in 1838; that Miller was hired as an engineer by the Captain or Master of the boat at \$125 *per month*, and performed four months services after the defendants became the proprietors; that he (witness) was Clerk at the time, and the writing truly expresses the sum that was due Miller at the time of its date. To the introduction of this evidence the defendants objected, but their objection was overruled and the deposition read to the jury. The Court charged the jury that if they believed the testimony above recited, which was all that was adduced by either party, they should find for the plaintiff. A verdict being returned accordingly, and judgment thereon rendered, the defendants have sued out a writ of error to this Court.

B. F. PORTER, for the plaintiffs in error. The demurrer should have been sustained to the first count, because it does not state a cause of action against the defendants, but if it sets forth a legal liability it is against Case individually. Case was an incompetent witness for the plaintiff; being both a party to the record and a party in interest, his evidence goes to discharge himself. [Chitty on Bills, 39 and note; 10 Wend. Rep. 271; 7 Porter Rep. 66; 9 id. 308; 1 Phil. Ev. 130; 2 id. 9, note 4, C. & H. ed.]

WM. COCHRAN, with whom was CRABB, for the defendant. The declaration substantially states a good cause of action, and very clearly alleges, in the first count, the agency of Case, and the making of the note by him in that character, for the defendants. [Martin v. Dortch, 1 Stew. Rep. 480; 1 Saund. Plead. and Ev. 260-1, 259; Hobson & Stringfellow v. Marriott, 1 Ala. Rep. N. S. 373; Watrous v. Evans, 2 Porter Rep. 205, 211.] There can be no doubt of the competency of Case as a witness, for the same reason that every agent without interest is allowed to testify for or against his principal.

COLLIER, C. J.—The questions presented for our examination are—1. Does the first count of the declaration set forth a cause of action against the defendants, with sufficient certainty and precision? 2. Was the evidence of Case admissi-

ble for the plaintiff, and did that, with the writing adduced, entitle him to a verdict?

1. It is an established rule in the law of pleading, that the declaration must alledge every thing necessary to the maintenance of the action, with such precision, certainty and clearness, that the defendant may know what he is called upon to answer, and that the jury may be able to give a complete verdict upon the issue; and that the Court, consistently with the rules of law, may give a certain and distinct judgment upon the premises. [Cowp. Rep. 682; 6 East Rep. 422; 5 T. Rep. 623.] Facts only should be stated, not inferences or matters of law; and a recovery can only be had upon the facts as they are alledged and proved. [Ibid.] *Again*, pleading must not be ambiguous, or doubtful in meaning; and when susceptible of two different meanings, that construction shall be adopted which is most unfavorable to the party pleading. [Stephens Plead. 378.]

Where one is sought to be charged with the act of another, proof of the authority under which the act was done is indispensable; [2 Saund. Plead. and Ev. 733,] and as the evidence must harmonize with the pleading, it should be substantially, yet distinctly, alledged that the act was the principals, or authorized by him.

Let us test the first count by these principles. The declaration describing the defendants as "owners of the steamboat Choctaw, and partners in running said boat," alleges that J. A. Case, Clerk of that boat, for and on behalf of the boat and its owners, the defendants, made and delivered to the payee a certain note, &c. Here is an allegation that Case acted for the boat and its owners, but not that he was authorized thus to act. The words "*for and on behalf*," are not of such pregnant import as to amount to an averment of authority. They are terms of extensive meaning, and are sometimes used to indicate the legal representation of another, but they are equally appropriate to characterize an act done in the name of another under an assumed agency; and as words receivable in a double sense, are to be taken most strongly against the pleader, they cannot be held to amount to an allegation that the writing declared on was signed by the procuration of the defendants

What are the powers of a Clerk of a steamboat, we cannot judicially know, and unless his right to represent the owners is stated upon the record, we cannot intend it. An act done by the master of a ship, or boat, seemingly within the sphere of his duties and office, would perhaps be regarded as entirely proper; [Story's Agency, 151; Paley on Agency, 388,] but in the absence of all proof, we should be disposed to consider the Clerk as a subordinate of the Master, as possessing only such powers as he conferred, or the Master or owners might recognize.

The cases cited by the defendants' counsel are entirely unlike the present. In the first, the declaration alledged that the bond was executed by the defendants, through their agent, and the Court held, the execution was *prima facie* good. The other citations, so far as pertinent, only assert that the manner of the execution of a writing by an agent is immaterial, if it appear to be done on behalf of the principal; and that a writing signed by an agent may be alledged to have been made by the principal. These principles are undeniable; but the objection in the present case is, that the declaration does not show that the defendants made the paper through an agent or otherwise, but that the Clerk of the boat undertook to make it for them. If it had been averred that the defendants made it by J. A. Case, their agent, then the declaration would have been good, and they should have been put to their plea.

2. Forming an opinion from the facts disclosed in the bill of exceptions, we think Case was a competent witness under the general rule which permits an agent to give evidence for his principal. [2 Phil. Ev. 96-7, 254-5; 3 id. 1526-7; 2 Saund. Plead. and Ev. 737.] The writing upon its face, would indicate that Case did not intend to bind himself, but to acknowledge that the owners of the Choctaw were indebted; [Story's Ag. 144-5,] and if there was any thing to bring the witness within an exception to the general rule, it should have been shown and cannot be intended.

The testimony established, that the defendants were joint owners of the Choctaw, the services of Miller as an engineer, under a contract with the master, and that the sum expressed in the writing, was due at the time it bears date. This was

Cullum et al v. Erwin, Adm'r.

certainly sufficient to have authorized a recovery on the second count of the declaration.

For overruling the defendants' demurrer the judgment is reversed and the cause remanded.

CULLUM ET AL V. ERWIN, ADM'R.

1. A second mortgagee may pay the amount due on the first mortgage, when it is susceptible of ascertainment, without an account between the parties, and file his bill for the sale of the mortgaged premises; when the decree will be for the sale of the premises to pay his debt and the redemption money paid by him—or if no obstacle exists to an account between the mortgagor and first mortgagee he may file his bill for foreclosure, making all persons in interest parties, and obtain a decree for a sale under both mortgages.
2. In such a case, if a dispute should exist between different defendants as to their respective rights to the avails of the mortgage, the Court could not settle the controversy between them upon their answers to the bill, but it would be necessary that a cross bill should be filed by them, or some of them, putting the matter in dispute in issue.
3. If, when the cause is ripe for a decree of foreclosure, the defendants claiming under a prior mortgage should not have taken the necessary steps to enable the Court to adjust their rights to the fund, the complainant should not be delayed for that cause, but the decree should be that the fund arising from the sale under the first mortgage be brought into Court, subject to its future disposition.
4. A defendant cannot in his answer, pray any thing but to be dismissed the Court; if he has any relief to pray, or discovery to seek, he must do so by a bill of his own.
5. The assignment of a note, secured by a mortgage on land, is, if not otherwise expressed, an assignment, *pro tanto*, of the mortgage also, and if the fund arising from the mortgage is not sufficient to pay the entire debt secured by it, the assignee will be entitled to a preference over the mortgagee.
6. Where several notes, secured by the same mortgage are assigned at different times, if the fund arising from the sale of the mortgaged premises is not sufficient to pay all the notes, the assignees will be entitled to priority of payment in the order in which the assignments were made, and not according to the time of the falling due of the notes, unless the assignor, at the time of the assignment, gave a preference to one or more in the mortgage.

Error to the Chancery Court at Mobile.

Cullum et al v. Erwin, Adm'r.

This was a bill filed by Henry Hitchcock, in his life time, to foreclose two mortgages executed by the Mobile Steam Cotton Press and Building Company, on a lot of land in the city of Mobile. The first mentioned mortgage being on land purchased by the corporation from Hitchcock, was given to secure the sum of fifty-five thousand eight hundred dollars, secured by five promissory notes, due at different periods—the other for fifteen thousand four hundred and thirty dollars seventy-two cents, secured by three promissory notes, was upon the same lot of land as the preceding, and also upon an additional adjoining tract, which had been purchased by the Company from one Charles Cullum, and to secure the purchase money of which a mortgage, prior to that of the complainant, had been executed. That on the first mortgage of complainant, there was due the sum of twenty-four thousand four hundred and eight dollars, and on the second five thousand one hundred and forty-three dollars eighty cents. That upon the entire lot the Company were building a large hotel, that for the prevention of waste and the completion of contracts for the erection of the building he had expended the sum of fifteen thousand dollars, and was entitled to a lien thereon for his reimbursement. That the complainant was informed that Cullum had transferred certain of the notes received by him from the Company to one Edward Harding, to the Bank of Mobile, to the Planters' and Merchants' Bank of Mobile, and to one John W. Freeman and that Reuben Barnes and James Barnes, claimed a lien on the building for work done thereon, and that one William Moore claimed the equity of redemption in the premises by virtue of a sheriff's sale.

These different persons are all made parties to the bill, and an account, foreclosure, &c. prayed. The different, mortgages, notes, &c. recited in the bill are made exhibits.

Freeman answered the bill, denying all knowledge of Hitchcock's mortgage, except from report; admits the execution of the mortgage to Cullum, by the Company, and that of the debt secured by that mortgage twenty-five thousand dollars had been transferred to him, and which he had transferred to the Bank of Mobile and the Planters' and Merchants' Bank of Mobile, and prays a decree that the mortgage remain undis-

Cullum et al v. Erwin, Adm'r.

turbed, except for the interest of those holding the notes to secure which it was executed.

Harding answers, admitting the facts stated in the bill ; that he holds one of the notes by transfer from Cullum, and secured by the mortgage to him for six thousand four hundred and sixty-seven dollars thirty-five cents, due 1st January, 1838.

An appearance was entered for the Planters' and Merchants' Bank, and the other defendants having failed to answer, the allegations of the bill as them, were taken as confessed, and the original mortgages, notes and bonds being produced and proven, were, with the bill and the answers of Harding and Freeman, referred to the Master to state an account.

The Master made a report setting out the dates of the notes and their amount, to secure which the several mortgages were made, with the other *liens* on the property amounting in all to \$122,652 19—that the property could not be sold in detached parcels, and should be sold for cash, the money to be paid into Court and distributed by order of Court.

The report was confirmed and a sale ordered.

At a succeeding term a bill of review was filed by Isaac H. Erwin, administrator of Henry Hitchcock—alleging that since the making of the decree, the premises had been destroyed by fire, that the value of the mortgaged estate was so greatly reduced as not to be sufficient to satisfy all the demands ; that therefore it is impossible to adjust the rights of the parties as was contemplated when the decree was made—that the claim of Moore to the equity of redemption had been determined against him by the Supreme Court.

The prayer of the bill is, that the original bill be revived in his name, as administrator, that a reference be made to the Master to report what is due to the several parties under the mortgages, and in what order of priority they shall be paid—that a sale of the premises be ordered, &c.

The bill was answered by Harding, who insisted on the prior *lien*, the note held by him first falling due, and having been transferred before its maturity, and prays a decree accordingly.

The Planters' and Merchants' Bank also answer the bill, insist on a lien as the transferee of two of the notes from Cullum, one for \$7,692 44, due 1st January, 1841, and one for \$8,100

77 cents, due 1st January, 1842—that since the destruction of the building by fire, the security is greatly impaired, and prays that the sale be suspended until the maturity of his notes, or until he consents to such sale.

At the May term, 1841, by consent of the parties, the reference, report of the Master, and decree of sale was set aside, and the following order made as of the preceding term: “And now, at this day, it appearing to the satisfaction of the Court that the Mobile Steam Cotton Press and Building Company, Charles Cullum, the Bank of Mobile, Reuben Barnes and James Barnes, have failed to answer the bill and supplemental bill, it is ordered that they be taken as confessed, as to them, and it is further ordered that the matters contained in the bill answer and exhibits, be referred to the Register, with instructions to take testimony and report to this Court, at the present term if practicable, a plan of the premises embraced in the several mortgages respectively, the amounts due on the several mortgages, to whom due, the times when the several notes secured by the said mortgages came into the possession and ownership of the present holders, and the manner in which the said premises can most advantageously be sold to pay the said several liens.”

On the 24th May, 1841, the Register made his report, setting forth that then there was due on the mortgage made to Cullum, exclusive of interest, the sum of \$36,506 49, secured by five notes, the amount of each of which is stated, and the times when they severally fall due. The first in point of time being in favor of Harding, the two next in favor of the Bank of Mobile, and the two last in favor of the Planters' and Merchants' Bank. That that portion of the premises described in the mortgage to Cullum should be sold first, to satisfy said debt—that the note due Harding be paid first, from the proceeds of the sale, and that the priority of the others should take precedence from the time they fall due.

The report also proceeds to state that there is due the estate of Hitchcock, on his mortgages, \$74,042 50, and that the lien of the workmen was discharged by the burning of the building.

The defendants having had two days notice of the report, and having failed to file any exceptions, the Court confirmed

Cullum et al v. Erwin, Adm'r.

the report, and decreed a sale of the premises, or so much as was necessary to satisfy the demand, in the manner laid down in the report, if not paid within sixty days, and from the proceeds of the sale to satisfy the debts as set out in the report.

From this decree this writ of error is prosecuted, and Charles Cullum and the Planters' and Merchants' Bank now assign for error—

1. That no notice was given by the Master of the time his report was made.

2. That the Master, in determining the priorities, decided on matters not referred to him.

3. That the reference to the Master was to ascertain facts to be adduced to the Chancellor.

4. That the Court erred in its decree, by settling questions between defendants on the mortgage to Cullum, and in giving a preference to Harding and the Bank of Mobile.

5. The Court erred in directing a sale of property to pay the claims of defendants, there being no cross bill filed and no issue joined.

6. The Court erred in granting a decree in favor of a defendant against his consent.

7. In decreeing a sale of premises for debts not due.

8. In not settling the mode of sale, and in adopting the report of the Master as to the mode of applying the funds.

9. In not dismissing the bill as to the defendants who disclaimed.

10. In reviving the suit as to some of the defendants, who are not mentioned in the supplemental bill.

CAMPBELL, for the plaintiffs in error, contended that the Court had no power, upon this bill, to adjust the conflicting claims of the different defendants to the amount due on the mortgage. The answers of Harding and the Planters' Bank were to the bill filed by the administrator of Hitchcock, with whom they had no dispute, they had therefore no power to litigate their claims in this suit, and should have filed a cross bill if they desired to do so.

The mortgage taken by Cullum was to secure the entire debt and therefore no priority of payment arises, from the fact that it was due by instalments. [17 Serg. & Rawle, 400; 1 Ver-

Cullum et al v. Erwin, Adm'r.

non, 39 ; 10 Pick. 129 ; 2 id. 123 ; 2 Wash. C. C. R. 47 ; 2 M. & S. 39 ; Story on Bail, 209 ; notes to 9th Cowen, 773 ; 2 Ala. Rep. 418.]

In support of the seventh assignment he cited 7th Ohio Rep. 2d part 232.

The inquiry before the Master was entirely insufficient to settle the question of priority between the defendants, which must depend on the contract between them and Cullum and not upon the date of the notes.

GIBBONS, contra, contended that the authority cited from 2d Ala. Reports was not opposed to the decree made in this case. That was the case of a decree made in favor of a subsequent incumbrancer, on a bill filed by a prior incumbrancer, but here the bill is filed by the subsequent incumbrancer, and of necessity a decree must be made in favor of the prior incumbrancer. He referred to the case of *Bloodgood v. McVay*, [9 Porter, 547,] as decisive to show, that the time of the falling due of the notes ascertained the priority or right in a contest between different assignees.

The defendants had notice of the report after it was made and failing to take exceptions are concluded by it.

ORMOND, J.—This bill was filed by Henry Hitchcock, to foreclose two mortgages, one of which was subject to a prior mortgage in favor of one Charles Cullum. The original and supplemental bills recite this fact, and state that the debt to secure which Cullum's mortgage was executed, was payable in six instalments, evidenced by six promissory notes, the first of which had been paid to Cullum, and the remaining five transferred by him to different persons who are made parties. That in consequence of the destruction of the building by fire, the property secured by Cullum's mortgage would not be sufficient to discharge all the notes, and that it would be necessary to ascertain the priorities between the assignees of Cullum, which the Court is prayed to do and direct a sale.

The Court decreed that the assignees of the notes from Cullum were entitled to the priority of payment in the order in which the notes fell due, and that being the principal question

we will first address ourselves to the consideration of that matter.

It is perfectly well settled by the decisions of this and other Courts, that when a debt is secured by mortgage, the debt is the principal and the mortgage a mere accessory or incident, and that an assignment of the debt unless otherwise expressed will be, in equity, an assignment of the mortgage also. [Duvall v. McLoskey, 1 Ala. Rep. 708; Emanuel & Gaines v. Hunt, 2 id. 190.] When, therefore, Cullum, the mortgagee transferred the second note falling due to Harding, if there was no express reservation of his interest in the mortgage, the assignment of the note was an assignment of the mortgage also, *pro tanto*, and if Cullum had retained the remaining notes and the mortgage property had proved insufficient for the payment of the entire debt, his assignee would have been entitled to priority of payment.

Being entitled to priority of payment against Cullum, he has the same right against the assignee of Cullum, as the latter could not convey a greater interest than he had himself. If each of the notes had been successively transferred in the same manner, each successive assignee would succeed to all the rights of the assignor at the time of the assignment, and this result would follow whether the notes were transferred in the order they fell due or not.

These consequences would flow from the mere assignment of the debt, which being the principal would, in equity, draw after it all its incidents, but there can be no doubt that one on assigning one of several notes secured by a mortgage, could, by a stipulation to that effect, reserve the mortgage as a security for the remainder of the debt; or on transferring several notes thus secured, he might determine which should have priority, if the property mortgaged was insufficient to pay all.

The case of Bloodgood v. McVay, [9 Porter, 547,] appears to go beyond the decision here made, and to determine that the assignee of the notes which first *fell due*, would have the prior right of payment. The Court places its judgment on the terms of the deed, which authorized a sale of the trust property on default of payment of either of the notes as they fell due. But in that case the assignment of the first was made prior to the assignment of the last note, and upon that which was the

real equity of the case the Court also rely, saying, that Bolling, (the *cestui que trust*,) could not transfer to the second assignee a greater interest than he had himself.

The same decision was made in *Gwathmey v. Ragland*, [1 Rand. 466,] under a precisely similar state of facts.

The same principle also governs the case of *Van Rensselaer v. Stafford*, [1 Hop. C. 569,] where it was held that one having two mortgages of equal date on the same land, and having assigned both, that by the first assignment he gave his assignee a preference over himself, if the property was not sufficient to pay both debts, and that the second assignee could be in no better condition than he was.

An analogous principle was also settled in the case *Clowes v. Dickinson*, [5 J. C. R. 235,] where it was held, that there was no contribution between purchasers in succession at different times, of different parts of the estate of a judgment debtor.

The only authority brought to our notice adverse to the view here taken, is the case of *Donly v. Hays*, [17 S. & R. 400,] in which the majority of the Court held that where a mortgage was given to secure a debt due by eight different instalments, for the payment of which eight bonds were executed, five of which a mortgagee assigned to different persons at different times, and retained three himself, and the fund arising from the sale of the mortgaged premises having proved insufficient to pay the entire debt, that the respective assignees and the mortgagee were entitled to a *pro tanto* dividend.

We cannot yield our assent to this decision, and think that the dissenting opinion of Mr. Justice Gibson is the law of the case. It will also be observed that the principle upon which the majority of the Court rest their decision, compelled them to hold that priority of assignment, not only gave no preference as between the assignees, but also that the assignee acquired no preference as against the assignor. The vice of the opinion is, that the Court appear to consider the debt and the mortgage executed to secure its payment as having no necessary connection, when the well settled doctrine is, that the mortgage is merely an accessory or incident, and the debt the principal.

In the case at bar, it appears that after the transfer of the note to Harding, the four remaining notes were assigned to

Cullum et al v. Erwin, Adm'r.

Fontaine & Freeman, by whom the two first falling due were assigned to the Bank of Mobile, and the two last to the Planters' and Merchants' Bank.

Fontaine & Freeman, by the assignment to them of the residue of the debt by Cullum, became invested with all the rights of the latter, and according to the principles here laid down, might have given both their assignees equal rights in the mortgage, or they might have given to either a preference.

The counsel for the plaintiffs in error insist, that no decree can be made on this bill settling the rights of the defendants as between each other, and that to enable the Court so to decree a cross bill was necessary. If wrong in that view, he then insists the proof did not authorize the decree which was made.

In England, upon the foreclosure of a mortgage the property is not sold, but the decree is that the equity of redemption be barred. If the bill is filed by a second mortgagee, the decree is that the second mortgagee shall redeem the first mortgage, and that the mortgagor redeem him or stand foreclosed. [Fell v. Brown, 2 B. C. 276.] In this country, where the decree is for the sale of the mortgaged premises, there can be no doubt that the second mortgagee may discharge the prior incumbrance by paying what is due, when that can be correctly ascertained, and have a decree for the sale of the property, for his own debt as well as the redemption money paid by him; or it may be that in a proper case he might have a decree to sell subject to the first mortgage. Such seems to have been the opinion of the Chancellor, in the case of the Western Insurance Company v. The Eagle Fire Insurance Company, [1 Paige, 284.] But the former, as it might require the advance of a large sum of money, might be exceedingly inconvenient, not to say unjust, to the second mortgagee, and in many cases be impracticable, as the amount due could not be ascertained without an account between the mortgagor and first mortgagee, which they might refuse voluntarily to enter into. For the same reason the latter course might be unjust and oppressive to the mortgagor, as no one could purchase understandingly until the amount due on the first mortgage was ascertained.

We think, however, that where no obstacle exists to stating an account between the mortgagor and first mortgagee, as is

Cullum et al v. Erwin, Adm'r.

the case here, that the subsequent mortgagee may file his bill to foreclose, and have an account taken of the amount due on both mortgages, making all who have an interest parties, and obtain a decree for the sale of the property. If a conflict of interest should exist among the defendants, as to the disposition of the fund arising under the first mortgage, it would not be proper that the subsequent mortgagee should be delayed, pending a litigation between them in which he had no interest. If the defendants, prior to the decree for the sale of the property, had not taken the necessary steps to enable the Court to adjust the priorities between them, or to settle what portion of the fund each was to receive, the money due on the first mortgage might be placed subject to the control of the Court upon a cross bill to be filed, or petition, as it might direct.

A cross bill is necessary against co-defendants where they have opposite claims, which the Court cannot determine upon in the bill already filed, and where the determination of such clashing interests is still necessary to a complete decree upon the subject matter of the suit. [Coop. Eq. 84 ; Story's Eq. P. 316.]

The complainant in this case, by his supplemental bill, has stated the conflict of interest between the different assignees of the notes, to secure the payment of which the first mortgage was made, but he does not place himself in an adverse position to the defendants, nor has he any interest whatever in the controversy between them in regard to the fund which will be the product of the sale under the first mortgage. Nor can we see how, consistently with the rules of Chancery pleading, one defendant can set up an interest adverse to another, without himself becoming an actor. It is the general rule that a defendant cannot pray any thing in his answer but to be dismissed the Court ; if he has any relief to pray, or discovery to seek, he must do so by a bill of his own. In this case the bill concedes that all the assignees of Cullum are entitled to the fund which will arise from the sale under the first mortgage, and thus far the Court may decree in favor of the defendants upon the bill. But if one or more of the defendants claim the entire fund, or a priority over the others, the matter must be put in issue, which can only be by a bill filed for that purpose ; or if the controversy should arise after a decree in the princi-

pal cause, by petition to the Court in the nature of a cross bill, for the proper distribution of the fund, under the decree.

If it were conceded that the distribution of this fund could be made upon this bill, the necessary facts were not before the Court, to enable it to decide upon the conflicting interests of the defendants. It does appear from the testimony in the cause, that the defendant, Harding, has the prior right in the fund. By the testimony of the defendant, Charles Cullum, the first mortgagee, taken before the Master, it appears that the note held by the defendant, Harding, was negotiated to him on the 28th November, 1836, and that the remaining four notes were transferred to Fontaine & Freeman, on the 11th May, 1838. But it does not appear whether these notes were transferred by them to the two banks at the same or at different periods of time, or whether any special preference was given to one over the other, further than would result from priority of assignment, and without a knowledge of these facts no decree could be made settling the priorities between them, if the fund is insufficient to pay all.

The view here taken of the cause, renders it unnecessary to consider the other assignments of error, but it may be proper to remark that the objection that a decree for the sale of the mortgaged premises could not be made against the consent of the Planters' and Merchants' Bank, on the ground that the last note held by the Bank was not due, has ceased to operate by the maturity of the note pending the litigation.

It follows from this opinion, that as the defendants have not litigated their rights to the fund which will arise from the sale, under the first mortgage, that the Chancellor erred in attempting to adjust their respective priorities upon this bill, but as the complainant should not be delayed for that cause, the Court should have directed a sale of the property, and decreed that the fund which should be the product of the mortgage to Cullum, be placed under its control, that the defendants might litigate their respective claims to it.

The decree of the Court must therefore be reversed, so far as it affirms the Master's report, giving the defendants, Harding, the Bank of Mobile, and the Planters' and Merchants' Bank, assignees of Charles Cullum, precedence and priority of right

Cullum et al v. Erwin, Adm'r.

in the fund to be raised by the sale of the mortgaged premises, according as the notes severally fell due. And this Court proceeding to modify said decree, doth hereby order, adjudge and decree, that the monies arising from the sale of the premises conveyed by the Mobile Steam Cotton Press and Building Company to Charles Cullum, if not sufficient to pay and satisfy the amount ascertained to be due, by the report of the Register, to the defendants, Harding, the Bank of Mobile, and the Planters' and Merchants' Bank, be brought into Court, at the next term, to be subject to the further order of that Court.

The writ of error in this case is prosecuted by Charles Cullum in behalf of all the defendants, against Isaac H. Erwin, administrator of Henry Hitchcock, but under the rule of this Court, errors have been assigned only by Charles Cullum and the Planters' and Merchants' Bank. Erwin has no interest whatever in this controversy, which is between the defendants, who were assignees of the notes executed by the Mobile Steam Cotton Press and Building Bompany, to Charles Cullum—it would, therefore, be obviously improper that he should be taxed with costs. The object of this writ of error is to ascertain the priorities of the defendants, Harding, the Bank of Mobile, and the Planters' and Merchants Bank, to the fund arising from the sale under the mortgage executed to Charles Cullum, and as they were equally to blame in not putting the case in a condition, to enable the Chancellor to make a decree settling their relative rights, the costs of this Court must be borne equally by all, each paying one third part thereof.

Let the cause be remanded for further proceedings.

White's Heirs v. The President &c. of the Florence Bridge Co.

WHITE'S HEIRS v THE PRESIDENT, &c OF THE
FLORENCE BRIDGE Co.

1. The defendant having answered the bill, but no testimony being taken, the parties agreed in writing, that the complainants were heirs, as they described themselves, and to submit the cause to the Chancellor at the approaching term of the Court—*Held*, that this was a hearing on bill and answer by consent, and the answer under the rule of practice was to be taken as true in all respects.
2. Where an act of the Legislature authorized the building of a bridge by means of stock to be subscribed, and after stock to a certain amount was subscribed, authorized the proprietors of a Ferry at the same place to subscribe their interest in the ferry and landings at an amount designated; if the owner of an interest in the ferry, &c., refuse to subscribe it, after the requisite amount of stock was taken, and the bridge is afterwards erected, his heirs cannot come in as stock holders, but will be concluded by the refusal of their ancestor.

The plaintiffs, (some of whom are infants and sue by their next friend,) describing themselves as the heirs at law of James White, late of Abingdon, in the State of Virginia, filed their bill in the Court of Chancery, sitting at Moulton. It is stated that James White, in his lifetime, was seized and possessed in fee simple, of one eighth part of a ferry across the Tennessee river, at the town of Florence; that the interest of their ancestor descended to the plaintiffs, and that the ferry and landings were of the value of thirty-five thousand dollars; that on the 12th January, 1832, a charter was granted, by an act of the Legislature of the State of Alabama, to incorporate a company under the style of "the President, Directors and Company of the Florence Bridge Company," for the purpose of erecting a bridge across the Tennessee river at that town. By the charter it was provided, that when the sum of sixty thousand dollars should be subscribed, in shares of one hundred dollars each, the owners of the ferry should be permitted to subscribe their respective shares therein and the landings thereto belonging, at the rate of thirty five thousand dollars for the entire interest; and that whatever might be thus subscribed should become part of the capital and joint stock.

It is also alledged, that shortly after the enactment of the

charter, books of subscription were opened by the commissioners designated for that purpose, and the sum of eighty thousand dollars or thereabouts, of stock was subscribed, and the bridge erected, which is now in constant use—that the ferry has become of no value, and with its landings has been appropriated to the purposes of the corporation.

The plaintiffs state further, that their ancestor did not, in his lifetime subscribe his interest in the ferry, in the stock of the corporation; they alledge that on the 11th day of December, 1839, they applied to the defendants for permission to subscribe the interest which descended to them in the ferry and the landings, but the defendants then, and have ever since, refused to allow them to take stock in the Bridge Company for the amount of the same.

The bill charges the receipt of tolls by the corporation from the — day of —, and prays that the plaintiffs may be allowed to subscribe their interest in the ferry and landings, and receive stock therefor; and also for an account of tolls received since the 11th December, 1839.

The corporation, through its President, answered the bill, admitting every thing alledged in regard to the charter granted in 1832, the interest of James White, deceased, in the ferry, the erection of the bridge and appropriation of the landings—but it neither admits or denies the heirship of the plaintiffs, and insists that if they are heirs the fact may be proved. The defendants state that James White, in his lifetime, did not subscribe according to the charter for stock in the corporation, but refused to do so, unless the company would agree in case the bridge should be destroyed, or rendered unfit for use, that his interest in the ferry should revert to him; to these terms, the President and Directors refused to assent. It is admitted that two of the adult plaintiffs, about the time alledged in the bill, did offer to subscribe for stock, the amount of their interest in the ferry, at the rate prescribed in the charter, but the President and Directors refused to receive their subscription, because the rate was greatly beyond the value of their interest; though they are willing to permit the heirs of James White to become stockholders on fair terms.

Previous to the hearing in the Court of Chancery, the par-

White's Heirs v. The President &c. of the Florence Bridge Co.

ties, by their solicitors, made an agreement in writing, as follows:

"In this case it is admitted that the complainants are the heirs of the said James White, mentioned in the bill, and we agree to submit the case to the Chancellor at the approaching special term. *January 19th, 1842.*"

The cause being heard by the Chancellor, he rendered a decree as follows:

"This case is submitted for a decree on the bill and answer, and upon the admission of the parties, by their counsel, 'that the complainants are the heirs of the said James White, mentioned in the bill.' The answer admits all the material allegations of the bill, with explanations and additions in some points, except what is embraced in the above admission. The answer is taken as true; and it appears to me to show very clearly, that the complainants are not entitled to the decree they ask. It is therefore ordered and decreed, that the complainant's bill be dismissed at their costs."

To revise this decree the complainants have prosecuted, a writ of error to this Court.

McCLUNG, for the plaintiffs in error.

S. PARSONS, for the defendant.

COLLIER, C. J.—In *Forrest and Wife v. Robinson*, [2 Ala. Rep. 215,] it was considered clear that where parties by consent, bring a cause to a hearing on bill and answer, the answer must be taken as true, even as to allegations which are irresponsible, or set up matters in avoidance. This decision was induced by the 9th rule of Chancery Practice, published in 1 Stew. Rep. 617, which has been abrogated by the later rules of practice. But the fourteenth of the later rules, [2 Ala. Rep. 12,] provides, "that in all cases a replication shall be considered as filed, unless the record shall plainly disclose that the cause is set down for a hearing on bill and answer by consent." Now the object of this rule, though perhaps not so clearly expressed as might be, was doubtless to secure to a defendant the benefit of his answer as evidence, where the parties consented to a hearing without proof from either side. True, the

White's Heirs v. The President, &c. of the Florence Bridge Co.

rule does not in express terms declare such to be the consequence where a cause is thus heard, yet it can subserve no purpose, unless its meaning be what we have supposed.

The agreement of the defendants to admit the heirship of the plaintiffs, and the consent of the parties to submit the case to the Chancellor at the then approaching term of his Court, was in effect a consent to bring the cause to a hearing on bill and answer. The admission that the plaintiffs were heirs of James White, deceased, cannot be so far regarded as proof in the cause, as to lead to a different conclusion; that admission is rather a waiver of the necessity of adducing testimony which the answer required, than evidence. And though the agreement is not *in totidem verbis* to submit the bill and answer, but the case itself, yet, as no proof was taken, we must consider the cause as having been heard on bill and answer, by consent. This being so, we are to regard the answer as in all respects true.

It is alledged in the defendant's answer, that the ancestor of the plaintiffs did, in his lifetime, refuse to subscribe for stock in the Bridge Co., to the amount of his interest in the ferry and its landings, unless the President and Directors of the corporation would agree, that that interest should revert to him in the event the bridge should be destroyed, or become unfit for use; that this condition was never assented to, and no subscription was consequently made. That provision of the charter under which the plaintiffs insist upon a right to be let in as stockholders, is in these words: "When there shall be subscribed the sum of sixty thousand dollars, the owners of the ferry across the Tennessee river, at said town of Florence, shall be permitted to subscribe their respective shares or interests in said ferry and ferry landings, at the rate of thirty-five thousand dollars for the whole; and the interests so subscribed shall become a part of the capital and joint stock of said corporation; and when the whole interest in said ferry and landings shall be subscribed or condemned according to the provisions of this act, the said corporation shall be vested with the whole title thereto, both in law and equity, to be held by them and their heirs and successors forever, upon the completion of the bridge according to this act." This statute doubtless contemplated

White's Heirs v. The President, &c. of the Florence Bridge Co.

that the corporation should acquire a right to the ferry and landings, either by the proprietors subscribing stock to the amount which the Legislature had estimated as its value, or by having the interest of the respective shareholders valued by means of legal process, and paying what might be adjudged to them respectively. But the act is incomplete in failing to prescribe the manner in which the value should be ascertained. Whether it would be competent now to legislate upon this subject, or whether the plaintiffs, and others standing in the same predicament with them, may maintain an action at law for an appropriation of their property, are questions which do not arise in this case. The point to be considered is, does the refusal of the ancestor of the plaintiffs to come in as a stockholder under the charter, prevent them from exercising that privilege?

It certainly requires no act in writing, in order to render effectual a renunciation of the right, which the act conferred upon the owners of the ferry; a refusal to take stock would not be a contract in any manner concerning lands, but the legal effect of a subscription would be, not only to transfer the franchise of keeping a ferry, but the landings appurtenant to it, and must be in writing.

A positive refusal to subscribe shares in the ferry for stock in the bridge, would be a waiver of the right, the more especially if there had been a change in the condition of the corporation; and a change of purpose under such circumstances can only be permitted by mutual consent. Upon the proprietors of the ferry declining to come in under the act, the Bridge Company may have increased its subscription for the purpose of raising the means to purchase the entire interest of the ferry and landings. If this were the case it might operate inconvenience and injustice, and in fact render necessary a reduction of the stock subscribed in money, if the ferry should be added to the joint stock of the corporation.—The Legislature never could have intended, that the shareholders of the ferry, should be allowed to change their decision on this point at pleasure, and when such a state of things might have retarded, if not prevented, the erection of the bridge.

Magee v. Carpenter.

The refusal of the ancestor of the plaintiffs to subscribe his interest in the ferry and landings to the stock of the bridge, is a bar to the assertion of such a right by them; and the decree of the Court of Chancery is consequently affirmed.

MAGEE v. CARPENTER.

1. The act of 1828, [Aik. Dig. 208, §5.] requiring deeds and conveyances of personal property to be recorded, applies to mortgages of personal property.
2. Deeds conveying personal property may be admitted to record on the oath of one witness, where there is but one to the deed.
3. The right of a mortgagor of slaves to the possession before default made may be sold under execution.
4. Such default will not be presumed from the fact merely that one instalment of the debt, to secure which the mortgage is made, is due.
5. The possession of a mortgagor, when consistent with the decree, is not a badge of fraud—therefore, where a mortgage was made to secure the mortgagees as sureties on three notes falling due at different times, with power to sell at the happening of the first default, the mortgagees may permit the property to remain in the possession of the mortgagor until the happening of the last default.

ERROR to the County Court of Mobile.

This was an action of trover brought by the defendant in error and two others, against the plaintiff in error, who recovered a judgment against him for thirty-nine hundred and sixteen dollars, for the conversion of three negro slaves.

From a bill of exceptions it appears that the plaintiffs offered in evidence a mortgage on the slaves sued for, executed to them on the 7th November, 1837, in the county of Montgomery by one Wait S. Hoyt—the condition of which was that the plaintiffs as co-securities for Hoyt and one Ford, had signed three notes, payable in Bank, dated 4th November, 1837, and falling due successively on the 1st June, 1838, 1839 and 1840, to be void if Hoyt and Ford paid off and discharged the notes,

Magee v. Carpenter.

“ But should the said Wait S. Hoyt, or any person in his stead fail to pay or cause to be paid, each and every one of said notes, as they shall respectively become due, then on the first defalcation, the said J. B. Carpenter, &c. or either of them, shall have full power and authority, and are hereby empowered to seize the said slaves, and after a continuing defalcation of thirty days, and further notice of thirty days in one or more public papers of the vicinity, the same to sell at public auction to the highest bidder for cash, &c.

“ It is hereby further understood and agreed that the said slaves are to remain in the possession of the said Wait S. Hoyt until defalcation, and that only such number of said slaves shall be at any time sold as may be required to meet the immediate defalcation, or amount in arrear, at the time of the sale.”

The mortgage was witnessed by one person, on whose evidence it was admitted to record on the day after its execution, in the County Court of Montgomery.

To the admission of this mortgage in evidence, the defendant objected because not proved and recorded according to law, but the objection was overruled and the paper read in evidence to the jury. The plaintiff also proved the execution of the mortgage by the subscribing witness.

The plaintiff also proved that the defendant, as sheriff of Mobile county, levied on the slaves described in the mortgage, by virtue of an execution in favor of the State Bank v. Ross, Hoyt & Ford, on the 3d April, 1839, and that on the day of sale the plaintiffs demanded the negroes of the sheriff.

The defendant proved that Hoyt, the mortgagor, had been in the continued possession of the negroes, from the date of the mortgage until the time of the levy—that he brought the negroes with him when he moved to Mobile from Montgomery, in December, 1838, and had exercised acts of ownership on the property ever since.

On this evidence the Court charged the jury, that after the perfection of the deed, all the interest of Hoyt become vested in the mortgagees, and the demand being made by them of the sheriff for the property, left no interest in the defendant, Hoyt, subject to the execution, but that the property was in the present plaintiffs.

Magee v. Carpenter.

The defendant moved the Court to charge the jury—

1. That if they believed that after the mortgage was made and executed, Hoyt remained and continued in the possession of the negroes until the levy was made, the plaintiffs cannot recover.

2. That if the jury believed that Hoyt was in possession of the negroes when they were levied on by the sheriff, and that the plaintiffs never did take or receive the negroes in their possession after the maturity of the notes mentioned in the mortgage, the plaintiffs cannot recover.

3. That if they believed that the defendant levied on the negroes in the possession of Hoyt, and that they had remained and continued in his uninterrupted possession until the time of the levy, and that the defendant afterwards, and by virtue of the execution, and under the levy, sold the negroes, the plaintiffs cannot recover.

These charges the Court refused to give, and the defendant excepted, as well as to the charge given.

The defendant prosecutes this writ and assigns for error the matter of the bill of exceptions.

CAMPBELL, for the plaintiff in error. The deed was void as against the plaintiff in execution, because not proved in the mode prescribed by law, and was improperly admitted to record. Two witnesses are necessary to a deed to authorize it to be admitted to record by the proof of witnesses. [5 Porter, 413.]

The deed not being properly recorded, the *lien* of the plaintiff attached. The deed takes effect from the registry as against a creditor, and *bona fide* purchaser. [1 Pick. 164; 3 id. 55; 2 Hawks, 520; 4 Leigh, 550.]

If the registration had been complete, the defendant in execution, Hoyt, being in possession, had an interest subject to levy and sale. [3 Stew. & Por. 408; 2 Ala. 318.]

DARGAN, contra. The mortgage was properly admitted on the proof of the subscribing witness, its effect was a matter to be inquired of subsequently.

There is no law requiring a deed to be attested by two witnesses, or by any, and the proof by one is sufficient to admit

the deed to probate and registration, it follows therefore, that where there is but one witness, he can prove the deed for registration. The statute, it is true, in giving the form of the probate, requires the witness to swear that the deed was executed in his presence, and that of the other subscribing witnesses, but that can only apply where there are more witnesses than one, and all attesting the paper at the same time—otherwise, three witnesses, not attesting at the same time, could not probate the deed for registration. The case referred to in 5th Porter, 413, has been modified if not overruled by *Bradford v. Dawson*, 2 Alabama Rep. 203.

By the levy, the sheriff was lawfully possessed of such interest as Hoyt had in the property, and if the possession prevented him from being a trespasser in the first instance, he became so on his refusal to deliver the slaves on the demand of the mortgagees, and trover will therefore lie for the value of the property.

ORMOND, J.—We are first to inquire whether the act of 1828, [Aik. Dig. 208, §5,] applies to such an instrument as this? Its language is, “all deeds and conveyances of personal property in trust to secure any debt or debts, shall be recorded in the office of the Clerk of the County Court of the county, wherein the person making such deed or conveyance shall reside, within thirty days, or else the same shall be void against creditors and subsequent purchasers, without notice,” &c. We think the language employed sufficiently broad to cover a mortgage of personal property. Previous to the passage of this act, deeds of this description were required to be recorded in open Court, within twelve months after their execution, and no reason can be assigned for making the change effected by this act in reference to deeds of trust which will not apply equally to mortgages. The Legislature no doubt supposed that the general terms employed of “deeds and conveyances,” would embrace all cases in which property was conveyed upon a condition, and such being the evident intention, and, it may be added, the practice, under this law, such must be its effect.

2. The question whether, where there is but one witness to a deed of trust or mortgage, it can be recorded on the proof of

its execution by the witness is one of more difficulty. The language of the act is, "such deeds and conveyances of personal estate shall be proved or acknowledged as deeds and conveyances of real estate." [Aik. Dig. 208, §7.] The reference for the mode or manner of proving the deed in order to its registration, is to the mode provided by law for the proof of deeds conveying land.

The first act on the subject passed in 1803, [Aik. Dig. 88, §1.] declares that if the deed be proved by one or more of the subscribing witnesses to it, or acknowledged by the grantor, before one of the Judges of the Superior, or Justice of the County Court, and such proof or acknowledgement, be certified on the deed, that it shall be received as evidence, &c.

The third section provides for the manner of probate where the parties are out of the State, and uses the term *witness*, in the singular number.

In 1812, an act was passed giving the form of the certificate of the probate—the portion material to this inquiry is to the following effect: "Personally appeared the above named E. F., one of the subscribing witnesses to the above deed, who, being first duly sworn, deposeth and saith, that he saw the above named A. B. whose name is subscribed thereto, sign, seal and deliver the same to the said C. D. that he, this deponent, subscribed his name as a witness thereto in the presence of the said A. B. and that he saw the other subscribing witness (or witnesses, naming them, as the case may be,) sign the same in the presence of the said A. B. and in the presence of each other, on the day and year therein named."

Subsequent enactments authorized the proof, or acknowledgement, to be taken by the Clerks of the Circuit and County Courts, or two Justices of the Peace, and finally by a single Justice.

There is no statute which requires a deed to be attested by two or more witnesses to give it validity, or indeed that it should be witnessed at all. In the case of *Fipps v. McGehee*, [5 Porter, 413,] this Court held that the form required by the statute must be pursued substantially, and that the probate of a deed by one witness, that he saw the deed signed and delivered, without also stating that he saw the other witnesses

"sign the same in the presence of the maker, and in the presence of each other," was defective. This it will be observed was a deed conveying land to which there was more than one attesting witness and in my opinion the case determines nothing more, than where there are more witnesses than one, the form of the statute must be pursued. I think the whole object of the form was to produce uniformity in the certificate of probate. That the Legislature supposed a deed would be admitted to probate where there was but one witness, is shown by the third section, which expressly gives the power to one witness, where the witness resides out of the State, and it would be difficult to assign a reason for admitting a deed to probate, on the oath of one witness out of the State, which would not apply within the State.

But be the law as it may in reference to deeds conveying land, as it respects deeds for personal property, the majority of the Court entertain no doubt that, where there is but one witness to the deed, it can be recorded on proof of its execution by him. The meaning of the Legislature, that these deeds "shall be proved, or acknowledged, as deeds and conveyances of real estate," evidently relates to the mode and manner of the proof, and the officers before whom it shall be made. The whole object of putting such a deed on record, is for the purpose of notice; it accomplishes nothing else, as was held by this Court in the case of *Bradford & Dawson v. Campbell*, [2 Ala. Rep. 203.] The certificate of probate is not evidence of the execution of the deed, and it would have been a strange absurdity if the Legislature had required higher evidence of the execution of the deed, to place it on the record of the County Court, for the purpose of notice merely, than would be required to give the deed validity when offered in evidence in a Court of justice.

The mortgage in this case was made to secure the mortgagees against liability as sureties of the mortgagor, on three notes, falling due at different periods of time, and stipulates that the mortgagor shall retain the possession of the slaves mortgaged until default be made—that when a default happened, by a failure to pay either of the notes at maturity, the mortgagees might seize and sell a sufficiency of the property to pay the amount then due. As the possession of the mort-

Magee v. Carpenter.

gagor was consistent with the terms of the deed, no presumption of fraud arises from the mere fact of the possession remaining with him after the execution of the deed, unless such possession continues after the happening of the last default, by the failure to pay the last note, then such possession would doubtless be a badge of fraud. We do not think the permission by the mortgagees to the mortgagor to retain the possession after the happening of the first and second defaults, would subject the property to sale by execution, at the instance of a third person, because such permission could work injury to no one but themselves, and not being inconsistent with the deed, would not be a badge of fraud.

If a default was proved by the omission of Hoyt, the mortgagor, to pay the first note to the Bank, which fell due on the 1st June, 1838, then, as the mortgagees were entitled to the possession of the slaves, to sell for such default, the demand by them of the sheriff, put an end to his right to retain them under the levy, conceding that his levy was not a trespass. If no defalcation was proved, then, according to the previous decision of this Court, the right to the possession, which, on that hypothesis, would be in Hoyt, was such an interest as could be sold under execution. [See the case of *Williams & Battle v. Jones*, 2 Ala. Rep. 314, and the previous decisions of this Court on which it was founded.]

This case was argued here, and from what appears in the record in the Court below, as if the mere fact that the first note was due when the levy and sale was made, was evidence that a default existed at that time. That could only happen by a failure to pay the note—whether it was paid or not, we are not informed by the record. If any presumption could be indulged, it would rather be that the note was discharged. At all events, it devolved on the plaintiffs to prove a default affirmatively, otherwise they showed no right to the possession of the slaves.

It results from this view, that the charge of the Court, that the right to the property vested in the plaintiffs by the perfection of the deed, leaving no interest in the property subject to the execution of the defendant, was erroneous, and for that cause, the judgment must be reversed and the cause remanded.

Magee v. Carpenter.

As this cause goes back for a new trial, it is proper to say that we have taken no notice of the fact, that the slaves were removed from Montgomery to Mobile, because no point was made, in argument, in reference to it, or the act requiring property so incumbered to be recorded in the county to which it is taken, and which, indeed, from the appearance of the record, was done in this case.

COLLIER, C. J.—It is not essential to the validity of a deed that it should be attested by witnesses, but to authorize its registration on the proof of a subscribing witness, it should appear to have been attested by at least two. This I think apparent as it respects a conveyance of realty, from the acts of 1803 and 1812, [Aik. Dig. 88-9,]—and the act of 1828 declares, that “deeds and conveyances of personal estate shall be proved, or acknowledged, as deeds and conveyances of real estate.” [Aik. Dig. 208.] The registration of deeds, upon the acknowledgement of the grantor, is expressly authorized, whether their execution be attested by witnesses or not. [See *Fipps v. McGehee et al*, 5 Porter’s Rep. 413.]

The conclusion expressed, seems to me to result from the consideration that our registry acts are introductive of a new rule of law, and a party who would avail himself of them, must bring himself substantially within their provisions.—Hence, I dissent from so much of the opinion of the Court as ascertains the law to be different from what I have stated.

CHAMBERS ET AL V. MAULDIN ET AL.

1. A subsequent incumbrancer is not bound to pay off prior liens, to entitle him to sell the property to pay his debt; but it is competent for him to go into Chancery to coerce a sale, and after the payment of such liens, obtain whatever balance may remain.
2. It is competent for a Court of Equity, under some circumstances, to remove one trustee and appoint another in his stead.
3. *Semble*—Where property is conveyed in trust, with a power of sale, the directions of the deed as to the manner of the sale must be pursued.
4. The powers of a trustee over the trust property depend upon the nature of the trust and the terms employed in its creation; and if not restricted, a trustee with a power of sale, may maintain *detinue* to recover the possession of personal property, and cannot, under ordinary circumstances, resort to Chancery for that purpose.
5. The grantor of slaves conveyed by deed, in trust for the payment of a debt, with a power of sale, is not liable for hire so long as he is permitted to retain their possession; but if he transfer the possession to a third person, that person, after a demand of him by the trustee entitled to the possession, will be accountable for hire.
6. Where a *cestui que trust* takes possession of slaves conveyed for the security of a debt due, he becomes liable to account for their hire; but where one purchases the interest both of the grantor and *cestui que trust*, and acquires the possession, he may elect to hold under the grantor; and thus avoid the payment of hire accruing previous to the time he was called on by a junior incumbrancer, to direct a sale under his deed.

In June, 1839, the defendants in error filed their bill in the Chancery Court at Mobile, for an injunction, and the settlement of the priority of certain deeds of trust, executed by Platt Stout, in which the parties were respectively interested. The record is voluminous, and it will be quite sufficient to the understanding of the points here considered, to make a condensed statement of the facts as they may be gathered from the bill, answers and report of the Master.

On the 13th December, 1838, Platt Stout conveyed to Mauldin three negroes, to wit: Henry, Milley and Hannah, as also certain lands, particularly described; in trust, to secure to Alexander Sledge the sum of one thousand dollars, which became due on the twenty-first of July preceding. On the 12th April, 1837, Stout conveyed to Aikin & Files, the slaves Henry

Chambers et al v. Mauldin et al.

and Milley, in trust, to secure to Thos. E. Tartt the payment of sixteen hundred and twenty-nine dollars and twenty-five cents.

Stout, on the 4th April, 1839, sold and conveyed to Chambers his reversionary interest in the three slaves embraced in the deeds of trust above recited; and on the 27th of the same month, Tartt sold and endorsed to Chambers four promissory notes, amounting in the aggregate to the sum of eight hundred and twenty-nine dollars and twenty-five cents, being the residue of the debt unpaid, which was intended to be secured by the deed of trust of April, 1837. At the time of the indorsement of the promissory notes, they, together with the deed of trust were delivered to the indorsee.

The terms of the deed to Mauldin, for the benefit of Sledge, authorizing a sale of the slaves on the failure of Stout to pay the debt intended to be secured, the trustee advertised a sale in obedience to its requirements; but before the day of sale arrived, Chambers had obtained possession of Milley, and was proceeding to sell the slaves through the agency of one or both the trustees in the deed for Tartt's benefit, without any notice whatever, under the pretence that he had all the interest of Stout and Tartt, and could dispose of them at pleasure. To restrain such a sale, was the object and effect of the injunction.

The decree declares, that Hannah did not pass to Chambers, in virtue of any of the deeds under which he claims, and that she is subject to sale under the deed of Stout to Mauldin, for Sledges security—that the proceeds of the sale of the two other slaves must be applied, first, to the satisfaction of the debt secured by the deed in favor of Tartt, and the balance, if any, must be appropriated to the payment of what may be due to Sledge. The priorities of the two deeds of trust being thus established, it was adjudged that, should the claims of the defendants conflict, the same may be adjusted by cross bill, to be filed for that purpose: *further*, that it be referred to the Master to take and state an account between the parties, and to ascertain and report the respective debts due, and owing, and secured by the two deeds of trust aforesaid; and also the value of the hire of each of the slaves, from the time the plaintiff made the demand to the present time.

Under this reference a report was made, stating with partic-

ularity the amount due to Chambers, as the assignee of Tartt, as well as the amount due to Sledge. The Master also reported the value of the hire of Henry, Milley and Hannah respectively, from the time the complainant's bill was filed, there being no proof of a demand previously. This report was confirmed without exception.

Referring to the decree which settles the rights of the parties, the final action of the Court upon the report proceeds as follows, viz: "That the value of the hire of the slaves, as reported by the Master, be credited as a payment *pro tanto* of the debt secured by the deed of trust from Stout to Aikin & Files, for the benefit of Tartt. And that the Master sell the said slaves for cash, to the highest bidder. at public auction, after having duly advertised the same, in manner as required of the sheriff of Mobile county in the sale of personal property under execution; and that he apply the money arising from the sale toward the payment of the debts of the complainant and defendant, according to their respective rights and priorities, as settled by the former decree; and that the surplus, if any, after paying the costs, to pay over to Stout; and if there be no surplus, then he is to retain the costs out of the money which was to be applied to the defendant's debt."

To revise the decree of the Chancellor a writ of error has been sued to this Court.

CAMPBELL, for the plaintiffs in error. It is not pretended that there is any fraud on the part of Aikin & Files. as trustees under the deed for Tartt; a Court of Equity therefore is not authorized to interfere with the legal rights which it confers. The only equity of which the complainants could avail themselves is, to pay off the incumbrance of Tartt; but they have no right to force the parties to a sale. contrary to the terms of the deed. [1 Paige's Rep. 284.] Had it been shown that the trustees were guilty of a fraud. the power to sell might have been taken from them, or its exercise controlled by the Court.

Chambers is improperly charged by the decree with the hire of slaves not in his possession, as well as with the hire of Hannah, who is not embraced by the deed from Stout, for the benefit of Tartt. True, by the purchase of the residuary interest of Stout, Chambers acquired the right to redeem that slave

from the deed of trust for Sledge, but upon no principle of law, can the value of her hire be deducted as a payment *pro tanto* from the sum for the payment of which the other slaves are held in trust. Chambers was not accountable for the hire of Hannah as a *cestui que trust*, or assignee, for she was not conveyed by the deed under which he claimed.

Chancery will not enforce a claim for rent in favor of a mortgagee who has the legal title. If he wishes to receive the rent he may make an entry. In the present case, if the hire of Hannah was required for the satisfaction of Sledges demand, the legal right should have been enforced. [1 Jacobs & W. Rep. 647.] We have no statute in this State which interferes with the legal remedy of the mortgagee in such cases, and the English law will of course apply. [2 Paige's Rep. 586; 5 Paige's Rep. 38; 1 Powell on Mortgages, 298, *note*.] It will follow from what has been said, that Chambers is not liable to Sledge for any part of the hire, even if he had, and still enjoys, the uninterrupted possession of all the slaves.

LESESNE, for the defendant. The bill charges, and the answers of Chambers and Stout admit, that the former had possession of all the slaves in question on the day previous to the filing of the bill; and he cannot be permitted to avoid the payment of hire, by showing that he permitted Stout to enjoy the benefit of their services without an equivalent, any more than if he had stipulated for, and actually received, a compensation for their labor. [Cooper's Jus. and notes, 400; Chapman v. Tanner, 1 Vern. Rep. 269; Cropping v. Cook, *id.* 270; Coote on Mortgages, 558 and cases there cited.

It cannot be admitted that Chambers, as the purchaser from Stout, occupied the position of a mortgagor in possession, and consequently is not chargeable with hire. This is a special provision in favor of mortgagors; but does not extend to a grantor in a deed of trust, after default in the payment of the debt intended to be secured, where the trustee is authorized to take possession of the trust estate. [Lewin on Trusts, &c. 87.] If Stout had retained the possession, Mauldin, as the trustee for Sledge, might have maintained detinue against him, and the measure of the recovery would have been the value of the slaves with their hires. It is needless to add more on

this point—the proof of demand of Chambers is perfectly conclusive.

As to the slave Milley, Chambers' possession commenced on the 4th April, 1839, when he purchased Stout's interest. In respect to Hannah, though he did not claim her under his contract with Tartt, yet he held her in virtue of his purchase from Stout, and is liable to account for her hire in the same manner, and to the same extent, as Stout would have been, had he never sold to him his right to redeem her.

The purchase of Tartt's interest can't place Chambers in a more favorable position; it merely invests him with the rights of Tartt, and made him liable to Stout in the same manner that Tartt was; and as Tartt, had he taken possession of Henry and Milley, would have been compelled to account for their hire to his grantor, the obligation to account rests upon Chambers.

The idea that the complainant's only equity is to redeem the slaves from the lien of Tartt's deed cannot be maintained, and requires no refutation.

COLLIER, C. J.—1. The adjustment of priority of lien between incumbrancers, and the appropriation of the proceeds of the property in dispute, is an acknowledged subject of equity jurisdiction. And although there may be no controversy as between the parties which shall be preferred in the order of payment, it is competent for a subsequent incumbrancer to go into Chancery to coerce a sale, and after the payment of prior liens, to obtain whatever balance may remain. True, if so inclined, he may purchase of the preferred creditors their demands, and thus acquire the right to control the securities which they held; yet, this is not the only course by which he can avail himself of his lien. If it was, he might lose all benefit of it, for the want of money or credit, though the object was adequate in value to the payment of all the debts, which it was conveyed to secure.

The case of the Western Insurance Company v. Eagle Fire Insurance Company, [1 Paige's Rep. 284,] does not lead to a different conclusion. There a mortgagee of certain premises filed a bill against a prior mortgagee of the same premises, praying that the mortgaged property might be sold, subject to

the incumbrance of the elder mortgage; or that the complainant might be permitted to redeem the prior mortgage; or that the whole interest in the mortgaged premises might be sold, and the amount due to the complainants paid out of the proceeds of such sale, after satisfying the prior mortgage. To so much of the relief prayed as sought a decree for the sale of the premises a demurrer was filed, on the ground that such a decree would give to the complainant, in the capacity of subsequent mortgagee, an undue control over the prior security of the defendant. The Chancellor said, "The usual decree in cases of this kind, in England, where strict foreclosures are still in use, is, that the complainants be permitted to redeem the prior incumbrances, that the junior incumbrancers redeem in course or be foreclosed; and if the complainants are not entitled to a decree to sell the whole estate, and pay the prior incumbrancers out of the same, they are at least entitled to redeem, and then sell the whole estate for the purpose of obtaining the redemption money, as well as to satisfy their own incumbrance. And if the prior mortgagees will not consent to a sale, or the amount of their incumbrances is not yet due, I do not at present perceive any valid objection to a decree for a sale of the equity of the redemption, subject to their mortgages, leaving the purchaser to pay the same as they become due, or whenever the prior mortgagees think proper to enforce their lien upon the premises." These remarks, so far from showing that the complainant's only equity, is to redeem the property conveyed from the lien of the deed for the benefit of Tartt, tend rather to prove that it is entirely competent to order a sale, subject to the prior satisfaction of the debt intended to be secured. No prejudice can result to Chambers from the exercise of such a jurisdiction, as the Court might direct that the property be offered for sale, and that the lowest bid received should be the amount ascertained to be due upon the notes of Stout to Tartt.

2. It is certainly competent under some circumstances for a Court of Equity to remove an old trustee and appoint another in his stead. [Lewin on Trusts and Trustees, 597, et post; 2 Story's Eq. 527.] But the bill in the present case contains no allegation against the trustees in the deed for the benefit of Tartt, nor is there any thing in the record to show that they

have not acted with entire propriety, or that they are unfit persons to execute the trust.

In *Greenleaf v. Queen et al*, [1 Pet. Rep. 138,] it was held, that where a deed conveys property in trust, to be sold for the benefit of a creditor of the grantor, the trustee must conform to the mode of sale pointed out by the deed; that this was the test of value which the grantor thought proper to require; and it was not competent to the trustee to establish any other, although by doing so, he might in reality promote the interest of those for whom he acted. We merely cite this case to show how strict the law is, in enjoining upon the trustee a conformity to the requisitions of the deed. We will not undertake to determine, (as it will be hereafter seen to be unimportant to a decision of the cause,) that there is error in the decree of the Chancellor upon this point; but we will remark, that it would be entirely regular to direct a sale to be made by the trustees in the deed under which Chambers claims, according to its terms, so far as they can be ascertained.

3. Upon the execution of a deed of trust, the legal estate vests in the trustee, for the benefit of the *cestui que trust*, and he may defend the property at law. [2 Story's Eq. 241; Willis on Trustees, 123, et post; Fletcher on Estates of Trustees, 2, 3, 5, 9, 16, 23, 40, 72, 75, 80, 82, 85, 88, 91, 101.] The powers pertaining to a trustee over the trust property, depend upon the nature of the trust and the terms of the instrument by which it was created. [2 Story's Eq. 241; Lewin on Trusts, &c. 234, 412.] If not inhibited by the nature of the trust, or the instrument under which he acts, he may reduce it into possession. [Lewin on Trusts, &c. 295, 412.] And while the *cestui que trust* is obliged to resort to equity for the assertion or protection of his equitable title, an action at law may be maintained in the name of his trustee. "So fixed and immutable is this principle," said to be, "that a trustee may maintain an ejectment against his own *cestui que trust*." [Willis on Trustees, 201, and cases there cited.]

If a trustee may sue at law for the recovery of real property, upon principle, it would seem, he might sustain an action of detinue to obtain the possession of personal property. This being the case, we cannot perceive how the trustee can be permitted to go into equity against the grantor, or one claiming

under him, and seek a decree for the sale of personalty, when by reducing it into possession he has ample authority under the deed to sell.

The slave Hannah was not embraced by the deed from Stout for the security of the debt to Tartt, nor does it appear that she was ever demanded of the former, or was in the possession of Chambers; and there is an entire absence of any allegation, or proof, to show that ample relief could not be obtained at law. Indeed it is difficult to conceive of any allegation that would confer jurisdiction upon Chancery, in respect to Hannah, as the act of 1830, "To regulate proceedings in certain actions of detinue," [Aik. Dig. 263,] affords quite as ample protection to the rights of Mauldin or his *cestui que trust*, as a Court of Equity can. The record shows that the lien of the complainant upon this slave was paramount to all other claims; in fact it does not appear that any adverse right was set up by any one. Under these circumstances we are of opinion, that the Chancellor should not have charged Chambers with her hire, or have entertained the cause so far as it relates to her.

4. A mortgagor remaining in possession by the permission of the mortgagee is not bound to account for rents and profits although the security is insufficient; unless they are specifically pledged. [Coote on Mort. 332, et post, and 555; 1 Powell on Mort. 174-7; 3 id. 946, note; Ex parte Wilson, 2 Ves. & B. Rep. 252.] In the Bank of Ogdensburg v. Arnold, [5 Paige's Rep. 38,] it was held, if the whole amount secured by the mortgage has become due, and the mortgaged premises are not of sufficient value to pay the debt and costs, the Court, upon the filing of the bill, may, upon due notice to the defendant, appoint a receiver of the rents and profits of the premises, or otherwise secure such rents and profits for the satisfaction of the debt and costs. But it was said, where the mortgagee has neglected to take a specific pledge of the rents and profits of the mortgaged premises, for the security of his debt before it becomes due, he has no equitable right to the rents and profits in the meantime; and in case of the death of the mortgagor, his judgment creditors are entitled to a preference in payment, out of such rent and profits.

It has been said that the mortgagee is the legal owner of the

mortgaged premises, and may eject the mortgagor without notice; that the latter is not entitled to emblements, nor is he authorized to underlet, and if he does, the mortgagee may treat his tenant as a trespasser. [1 Powell on Mort. 155; 6, 161; 6, 259, note; 2 id. 429, note.] And the mortgagee, by giving notice to the tenant in possession, may recover the rent then in arrear, or which may afterwards accrue. [1 Powell on Mort. 17-24.] This doctrine was declared by the Court of King's Bench, in *Moss v. Gallimore*, [Doug. Rep. 266,] where the tenant held under a lease made previous to the execution of the mortgage.

But if a mortgagee take possession, he is considered inequity, in some measure, in the light of a trustee, and accountable for the profits. [Coote on Mort. 320, 368, 556; *Reed v. Lansdale*, Hard. Rep. 7; *Brainbridge v. Owen*, 2 J. J. Marsh. Rep. 465; *Whittick v. Kane*, 1 Paige's Rep. 202; *Robertson v. Campbell*, 2 Call's Rep. 421; *Van Buren v. Olmstead*, 5 Paige's Rep. 9.] And where slaves are taken possession of by a mortgagee, he becomes liable to the mortgagor for hire. [*Fenwick v. Macey's ex'rs.* 1 Dana's Rep. 286; *Wilkins v. Sears*, 4 Monr. Rep. 348.]

We have been thus particular in stating the rules in respect to the rights and liabilities of mortgagor and mortgagee as they apply with all force not only to mortgages, but, in analagous cases, where the security is given by deed of trust. To apply them to the case before us, and it is clear that Stout was not chargeable with hire, so long as he was permitted to retain the possession; but if he transferred the possession to a third person, under a contract for the sale of his reversionary interest or otherwise, that person, after demand of the slaves was made of him by the trustee, who was entitled to the possession, would be liable for hire.

Chambers, in virtue of the assignment of Tartt, became the *cestui que trust* of the property which was conveyed for the security of his assignor, and was fully substituted to his rights. If Tartt had taken possession of the slaves, he would have been accountable to Stout for hire, and to that extent would his lien have been extinguished. But Chambers' possession may be referred both to his purchase from Stout and the assignment by Tartt; and as a purchaser he is not liable for hire previous

to the time he may have been called on to direct a sale under his deed, or some equivalent step was taken by the junior incumbrancer. Whenever this was done, the hire thereafter accruing, would be a charge upon him, and go in satisfaction of the debt of which he was assignee.

It does not appear that Chambers had the possession of both the slaves embraced in the deed for Tartt's benefit. Milley alone was in his possession, while Henry remained with Stout. There is then no pretence for charging him with the hire except as to Milley. The decree of the Chancellor in this particular, can only be sustained upon the legal hypothesis, that as Stout's possession was acquiesced in by Chambers, it shall be considered as his own. We know of no warrant for such a conclusion.

5. No question was raised in the argument as to the priority of the lien of Tartt's deed. The decree was rendered by the Court of Chancery, under the impression it was sufficiently shown by the answers, that Sledge was informed of its execution when he received his security from Stout. It is stated in the answer of Aikin, a trustee in Tartt's deed, that within thirty days after it was executed, he handed it to the Clerk of the proper County Court, duly proved, with directions to register it; but upon inquiry at the office, he learned that it had not been recorded, and upon search it could not be found in file. In addition to which, he, as well as several other of the defendants, state facts from which an express notice is inferable. Whether these answers are thus far responsive to the bill, or are evidence, or whether it would not be safer to sustain the answers by proof, we deem it unnecessary to consider at this time.

For the several errors particularly noticed in this opinion, the decree of the Court of Chancery is reversed and the cause remanded, that it may be disposed of according to the principles we have laid down.

POPE v. LEWIS.

1. No judgment can be rendered in an action brought to recover a penalty by a common informer, after the repeal of the statute giving the penalty, unless some special provision for that purpose be made by statute.
2. The commencement of a suit for the penalty does not give a vested right to it, but will entitle the party so suing to a preference over one suing subsequently.

ERROR to the County Court of Mobile.

This was a *qui tam* action by the defendant against the plaintiff in error, for selling rope and bagging without inspection.

The Court charged the jury, that if they found the defendant guilty under the third section of the act, on which the action is founded, their verdict should be for the plaintiff. That the repeal of this act by the last Legislature could not affect the plaintiff's right—to which the defendant excepted.

Various other points were made in the cause, which are not noticed in the opinion of the Court.

CAMPBELL, for plaintiff in error, argued that the repeal of the statute was a discharge of the action. [2 N. H. Rep. 105; 1 Gall. 192; 3 Peters, 57; 18 Maine, 109; 1 Breese, 115; 6 Wend. 526; 2 Bailey, 584; 1 N. H. 61; 6 Cranch, 329; 5 id. 281; 2 Dana, 330.]

LESESNE and STEWART, contra, insisted that the right to the penalty vested in the informer, on the commencement of the action. [5 Bro. Parl. Cases, 75; 2 Har. Dig. 509; 2 Peters Rep. 657; 16 Mass. 330; 2 Conn. 321.]

That the King cannot release the portion given to the informer after action brought. [2 Coke, 65, b.; Cro. Eliz. 138; 1 Bac. Ab. 61.]

That the true distinction was between the repeal of an act affecting the remedy, and the repeal of one giving a right. In

Pope v. Lewis.

the former case no right is taken away, but may be enforced in some mode.

They insisted that the question here, was, not what the Legislature might do, but what it had done, and that was, whether, by construction, it can be presumed that the Legislature meant to divest a right. That a retrospective effect is never given to a law by construction. [2 Shower, 16; 15 Maine, 134; 7 Johns. 477; 4 Ser. & R. 401; Breese Rep. Sup. 29; 3 Moore & Payne, 143.]

ORMOND, J.—The principal question in this cause is, whether any judgment can be rendered in an action founded on a penal statute after its repeal?

The counsel for the defendant in error, maintain, that by the commencement of this suit, for the penalty prescribed by statute, for selling rope and bagging without inspection, the defendant acquired a vested right in the penalty, which the subsequent repeal of the statute by the Legislature, cannot deprive him of.

As it is very certain that vested rights, properly so called, are beyond the control of the Legislature, it becomes necessary to inquire on what foundation this assumption rests. It will not be contended that the right which vests in a common informer to a penalty, for which he has commenced a suit, stands upon the same footing with his right to property acquired by purchase, or by his labor. Laws may aid in protecting him in the enjoyment of his property, or assist him in reclaiming it from a wrong doer, but his right to property thus acquired exists independent of written law, and is beyond the control of the Legislature.

The foundation of the claim to a penalty prescribed by law, is derived entirely from the statute authorizing a judgment to be rendered in favor of any one who will sue for it. This claim is imperfect until a judgment is rendered for it, when the right to the money becomes perfect, or, in other words, it becomes an absolute vested right. Blackstone, in the third volume of his Commentaries, [160,] places this right on the implied contract supposed to be entered into by each member of the society, to be bound by its fundamental laws. Without, however, entering into any subtle speculation as to the source

of the power exercised by the Legislature in the passage of such laws, it is very clear that a judgment obtained according to the forms and under the sanction of prescribed law, must, while the society exists, be the very highest evidence that the debt or duty to enforce which the judgment was rendered, is the property of him in whose favor it was rendered. It is therefore one of his vested or absolute rights which the Legislature cannot control. It follows, necessarily, that as the right to the penalty is inchoate until judgment, if, from any cause, no judgment can be rendered for the penalty, the absolute or vested right to it can never exist.

It cannot admit of doubt that the Legislature may, at its pleasure, repeal any penal law, and it is equally well settled, that after such repeal no judgment can be rendered, either of corporal punishment or pecuniary fine. In the language of Judge Marshall, in *Yeaton v. The United States*, [5th Cranch, 281,] "it has long been settled on general principles, that after the expiration or repeal of a law, no penalty can be enforced nor punishment inflicted, for violations of the law, committed while it was in force, unless some specific provision for that purpose be made by statute." To the same effect is the *Schooner Rachel v. The United States*, 6 Cranch, 329; *United States v. Preston*, 3 Peters, 57; *The Commonwealth v. Welch*, 2 Dana, 330; *The People v. Livingston*, 6 Wendell, 526; *Lewis v. Foster*, 1 N. Hamp. 61.

In opposition to the view here taken, we have been referred to the case of *Couch v. Jeffries*, [4 Burrows, 2460.] That was an action *qui tam*, brought to recover the penalty for not paying the stamp duties upon an indenture of apprenticeship. The plaintiff obtained a verdict, after which an act of Parliament was passed declaring that in all cases where a forfeiture had accrued, if the duty was paid by a certain time, and the indentures produced to be stamped, the offender should be discharged for the penalty. The defendant having paid the duty within the time, moved for a rule against the plaintiff to restrain him from entering up judgment. The Court held that it was not the intention of Parliament that the act should apply to suits then in existence, but merely to bar future actions, and Lord Mansfield observed, that the argument urged in favor of the

defendant would equally prove, "that if the judgment had been signed and execution taken out, and the money afterwards paid into the stamp office, the levied money ought to be refunded."

In this case it is to be observed that the law creating the penalty was not repealed, but a subsequent act was passed relieving those from the penalty who paid the duty into the stamp office by a certain time. It was therefore a mere question of construction, as to the meaning of the last law, and the Court very equitably at least, held that it was only intended to bar future actions, after the duty was paid. In a word, the only question presented to the Court was, whether the last law should be retrospective in its character, or operate in future. It is not perceived how this decision can aid us in the investigation of this part of the case. So far as it may be supposed to bear on the construction of the repealing statute, it will be hereafter adverted to.

We have also been referred to the case of *Grossel v. Ogilvie*, [5 Brown Parl. Cases, 75.] In that case, an information had been filed in the Court of Exchequer, in Scotland, by *Grossel v. Ogilvie*, upon a penal statute for relanding tobacco, after obtaining a certificate for exporting it without being impelled thereto by stress of weather, which was the offence for which the penalty was given. To the information the defendant pleaded a subsequent act of Parliament of indemnity, to which the prosecutor demurred. The Court in Scotland gave judgment on the demurrer for the defendant. On appeal to the House of Lords this judgment was reversed and judgment rendered for the King and the informer, upon the ground that the act of indemnity, pleaded in bar of the information, did not embrace the case made by the information. We cannot discover that this case has any application to the one at bar—all that is decided is, that the act of indemnity of 18 George 2d, did not release or discharge the penalties imposed by the 8th Ann, c. 13, for relanding tobacco, upon which a certificate had been obtained for exportation. It was not a question of law as to the effect of a repeal of the statute, but whether in point of fact there was such a repeal as was alledged.

It does not militate against the view here taken, that by the commencement of a suit an informer obtains a right to the pe-

nalty against, or rather in preference to, one suing subsequently for the same penalty, although the latter may first obtain judgment. It would open a door to fraud and collusion were it not so, as it would be in the power of the defendant, by omitting to make defence to the last suit, to give the penalty to one who might be in collusion with him, and thus, in effect, make the law operate as a penalty upon the party first suing. When, therefore, the law gives the right to sue for a penalty, it must, in the nature and reason of the thing, be to him who first asserts his right to it.

It is also true, as urged, that the King cannot, by a release, discharge the offender from that portion of the penalty which goes to the informer, and this not because he has an absolute vested interest in the penalty, before judgment, but because his right, though inchoate and contingent, is given by law, and therefore not within the control of the King. Any control or interference with it by the Executive Magistrate, would be the exercise of the odious power of dispensing with the law—the portion going to the State he may release.

It is further urged that the repeal of a penal statute prevents the rendition of judgment only in cases where the entire penalty goes to the State. We think this position untenable, both on principle and authority. The cases cited from 5th and 6th Cranch, were both cases in which a moiety of the penalty went to the revenue officers of the United States, making the seizure under the 90th section of the act to “Regulate the collection of duties on imposts and tonnage.” [1 Story’s Laws U. S. 655.] The case of the United States v. Preston, [3 Peters, 57,] is still stronger. An act of Congress empowered the State of Louisiana to pass laws for disposing of such persons of color as should be imported or brought into that State contrary to law. Pursuant thereto the State passed a law directing the sale of all such negroes, and appropriated the proceeds. A seizure was made and the negroes sold for a violation of this act of Congress, after which, and pending an appeal, to the Supreme Court, the act of Congress was repealed, and the Court held that the right of the State was extinct. The same principle was decided in *Lewis v. Foster*, 1 N. H. 61; in the *Commonwealth v. Welch*, 2 Dana, 331; and in the *People v. Livingston*, 6 Wendell, 529; and, as we are informed, in the case ci-

ted from 2d Bailey, 584. In all these cases the right of individuals came in question.

Nor is it easy to perceive how, on principle, any other decision could be made. It has been shown that this class of rights is inchoate, derived from, and dependent on, the statute which gave them birth. It is, in effect, a transfer by the State to one of its members, of a penalty forfeited to the body politic and it is difficult to perceive upon what principle the transferee could enforce it when the transferor could not.

It has been strenuously urged that the true construction of the repealing statute is, that it is not to operate on suits actually brought, as that would be to give the repealing statute a retrospective effect. The general principle in regard to statutes certainly is, that they are not, by construction, to have a retrospective effect, as has been repeatedly held by this Court, and at the present term. But there is no room for construction here. The repealing statute (acts of 1830, '31,) absolutely, and without reservation, puts an end to the act thus repealed, and as to all penalties and forfeitures created by it, and not ascertained by judgment, it is as if it never had existed. The effect of a reservation, or saving, in the repeal of a penal statute, as to suits commenced under it, is to continue the statute in force *quoad* such suits.

To hold then that this unqualified repeal of the act, was no repeal as to this case, would be a palpable act of legislation under the mask of construction. The principle that no penalty can be enforced after the repeal of the statute creating it without express provision to that effect in the repealing statute is recognized in all the cases we have cited.

In the case cited from 4th Burrows, 2460, and already commented on, the penal statute was not repealed, and the question whether the subsequent statute relieving against the forfeiture, applied to suits there brought, for the penalty was one of pure construction, with the correctness of which we have no concern in this case. It is to be observed too, that there the informer had obtained a verdict, and nothing remained to be done but the mere formal act of signing judgment, and, as Lord Mansfield observed, the objection would apply with equal force if judgment had been formally entered. It was doubtless in reference to these facts, that eminent Judge spoke

Mardis' Admr's v. Shackleford.

of the right of an informer as a "*vested right*"—language which could not be appropriately applied to the mere commencement of a suit for the penalty.

Whether the obligations of good faith would not require the State to refund money actually expended in the prosecution of a suit authorized by it, and to reimburse its citizens for costs incurred by the repeal of the law, is a question which must be addressed to another forum.

The judgment here pronounced is at variance with the opinion of this Court in the case of Taylor v. Rushing, [2 Stewart, 160,] and in accordance with the previous opinion pronounced in The State v. The Tombeckbe Bank, [1 Stewart, 347.] In the first mentioned case, it does not appear, from the report of the case, that the point arose in judgment, and the cases cited from Cranch are, by the Court in that case, attempted to be answered, by supposing that the United States alone was interested in the penalty. In this the Court were clearly mistaken. The case in 2d Stewart must be overruled.

Let the judgment be reversed.

MARDIS' ADMR'S. v. SHACKLEFORD.

1. A declaration against an Attorney at Law, commencing in *assumpsit*, and alleging that he undertook to collect sundry notes and accounts, and concluding that "contriving to deceive and defraud," he negligently failed to perform his undertaking, is not demurrable as being both in *assumpsit* and *case*—in the conclusion unnecessary terms are employed, but they do not vitiate the declaration, or change the character of the action.
2. If an attorney acknowledge in writing that he has notes belonging to J. S., to be applied to the payment of the debts of a firm, of which J. S. was a member, he is liable to J. S. in an action for money had and received, for such part of the notes as may have been collected, and not appropriated to the payment of the creditors of the firm.
3. Where an Attorney, by a formal receipt, or mere memoranda, acknowledges that notes and accounts *past due* are placed in his hands, the presumption is

Mardis' Admr's. v. Shackleford.

that he received them for collection ; and the legal effect of such a writing is an undertaking that he will use due diligence for that purpose.

4. J. S. declared against the defendants for the negligence of their intestate in failing, as an Attorney at Law, to collect "sundry notes and accounts," and offered in evidence a paper subscribed by the intestate, which is in these words—"Notes sent Philpot for Smith's horse, (here the notes are described, by stating the names of the makers and their amounts.) "Left with me F. & H's. note for \$70, due on the 1st January, 1829, to bring suit on." Held, that this paper unexplained by other proof, was irrelevant and inadmissible ; but under the count for money had and received, the acknowledgement that F. & H's. note was left with the intestate was admissible as a link in the chain of testimony necessary to show its amount, or the plaintiff's title to the money collected thereon.
5. Where evidence is adduced which is pertinent, but insufficient, the party against whom it is offered, should ask the Court to instruct the jury as to the application and legal effect of the testimony, instead of objecting to its admission.
6. Where an objection is made to the admission of a writing, part only of which is inadmissible, the Court is not bound to distinguish between the different parts, but may overrule the objection *in toto*.
7. If the subscribing witness to a bond be dead, proof of the handwriting of the obligor is admissible to establish its execution.
8. An Attorney at Law, in whose hands notes, &c. are placed for collection, will be individually liable for neglect, or for money had and received, though he give notice that he had afterwards associated with him a partner in the practice of his profession, who collected the money ; unless the client recognized the partnership in the transaction of his business.
9. The statute does not require that a claim against the estate of a deceased person shall be presented to all the personal representatives, where there are more than one ; nor does it impose upon the creditor the necessity of presenting the evidence by which the demand is sustained.
10. An Attorney at Law is only liable for gross negligence, which is a question of fact ; and the proof of it must always vary, according to the case stated in the declaration.
11. The receipts of an Attorney for notes, &c. for collection, do not in themselves prove that he is guilty of negligence ; but if the receipt is of an old date, and the Attorney was informed of the debtor's residence, or upon due inquiry might have been, and did not discharge himself from his engagement to collect the debts, in the absence of countervailing proof, negligence may be inferred.
12. The measure of damages to which an Attorney is liable for failing to perform his undertaking with his client, is the loss which has resulted from his negligence.
13. Where an Attorney gave his receipt for receipts which third persons had given for notes, &c., the inference will be that he undertook to supervise the collection of the notes, &c., to make settlements with the persons who held them ; and if he neglected to perform that duty so that injury resulted, he will be chargeable.
14. An Attorney who collects money in his professional character, is not liable to an action until after demand ; but where he has agreed, in advance, to pay over money when collected to the creditors of his client, and fails to do so, such undertaking dispenses with a formal demand.

Mardis' Admr's. v. Shackleford.

15. The statute of limitations in favor of an Attorney who is charged with negligence in the performance of a professional engagement, begins to run from the time he became liable to an action, although the damage may not be developed, or become definite, until sometime afterwards. And an Attorney who undertakes to collect notes &c. by suit, must sue to the first Court, to which, with *reasonable* diligence, suit could be brought; if he fails, he is suable immediately.

WRIT of Error to the Circuit Court of Talladega.

This was an action of assumpsit by the defendant in error against the plaintiffs. The declaration contains six counts, to each of which there was a demurrer, which was sustained as to the fourth and overruled as to the others. The sufficiency of the third count alone is now drawn in question. That count alledges, that in consideration of the employment of the intestate as attorney and counsel to collect sundry notes and accounts, which are described, the intestate undertook, &c. to proceed without delay in the collection of the same. Nevertheless, the intestate, not regarding his promise, &c., but contriving to deceive and defraud the plaintiff, did not, nor would proceed, &c., but wholly failed, &c. And the intestate, by such neglect, has been hindered and delayed, &c. By reason whereof the intestate became liable, &c.: and being so liable, &c. then and there undertook, &c.

On the trial, the defendants excepted to the ruling of the Court; the several points of exception are here shown in the order in which they are presented in the bill of exceptions.

1. The Court permitted to be read to the jury, notwithstanding the defendants' objection, a memoranda in the intestate's hand-writing and subscribed by him, in which fourteen notes are described as being in his hands, to be applied to the discharge of the debts of Burke, Shackleford & Co.; but which notes are admitted to be the individual property of the plaintiff.

2. The plaintiff was permitted to read to the jury a writing as follows: "*Memoranda* of notes belonging to Jack Shackleford," describing them by the names of their payors, amounts, and when due; and subscribed by the intestate as an Attorney at Law.

3. The plaintiff was allowed to give in evidence the follow paper, viz:

"Notes sent to Philpot for Smith's horse—

Mardis' Admr's. v. Shackleford.

Jones Bailey and Sam'l Acton,	-	-	-	-	\$75 00
Wm. Acton and John Acton, Sen'r.	-	-	-	-	24 93
					<hr/>
					\$99 93

Left with me F. & Hardin's note for \$70, due on the 1st January, 1829, to bring suit on.

S. W. MARDIS."

4. The plaintiff was allowed to read as evidence a bond made in his name, by the intestate as an attorney in fact, upon proof of the intestate's hand-writing, without proving the hand-writing of the subscribing witness, who was dead.

5. The plaintiff was permitted to adduce to the jury a letter of the intestate, written after he had received the notes, &c. of the plaintiff, (stating that his partner, Mr. Moody, would take charge of them, &c.) for the purpose of showing a partnership; and thus making admissible receipts for money made by Moody, in the name of Mardis & Moody, for the use of the plaintiff.

6. The plaintiff was permitted to read the deposition of a witness, for the purpose of proving the presentation of his claim to one of the administrators of the intestate, within eighteen months from the grant of administration, although the witness could not state positively, but only from belief founded on circumstances, that the paper accompanying his deposition was the same that was shown to the administrator; and although the claim presented was not sustained at the time of its presentation, by the proof in its favor. The Court also refused to exclude that part of the deposition of the same witness in which he related the declaration of the administrator, that he would make good so much of the claim as he could not show was discharged.

Evidence was adduced by the plaintiff to show to what extent the claims received by the intestate were collectable. It was also in proof that Burke, Shackleford & Co. had been dealing in merchandize, and were largely indebted at the time the intestate received the notes, &c. due their house; *and, further*, that intestate was invested with very general powers by the plaintiff in their collection, and was even authorized to exchange them for the debts owing by B. S. & Co.

The defendants by the counsel moved their Court to instruct the jury.—

1. To entitle the plaintiff to recover on account of the notes described in the *memoranda* referred to, in the second exception to the evidence, it should be shown by extrinsic proof that the notes went into the possession of the intestate, or that he collected the money on some or all of them, or that he was guilty of gross negligence in failing to collect them: that the bare production of the *memoranda* and proof of the solvency of the debtors, was not sufficient *per se* to authorize a verdict in favor of the plaintiff for the notes. Which charge was refused by the Court, who, instead thereof, instructed the jury, that when an Attorney at Law gives his receipt for the collection of notes, it becomes his duty to sue upon them, and that he is responsible, unless he shows he has brought suit upon them, and used the proper means for their collection; and that the production of the receipts signed by intestate, was evidence entirely satisfactory that the notes were received by him.

2. That the production of the receipts of intestate, with proof that the persons named therein were solvent, in the absence of all other proof in regard to liability thereupon, is not sufficient to entitle the plaintiff to recover upon the receipts. Which charge the Court declined to give.

3. The defendants are not liable in this action for monies collected by their intestate, unless a demand was made, either of them or one of them, or of intestate. In answer to which the Court thus charged the jury—that a demand was not a formal thing, but if the jury believed, from the evidence, that the plaintiff had instructed the intestate to pay the money to other individuals, such instruction would amount to a demand.

4. That if no proof has been adduced with respect to the receipts or memoranda subscribed by the intestate, other than their execution, and the solvency of the makers of the notes described, then the statute of limitations begins to run from the dates of the receipts. Which charge the Court refused to give, and in lieu thereof instructed the jury, that the intestate was liable to an action after he had had a reasonable time to collect the notes, and from that time the statute began to run.

5. In one of the receipts given by the intestate to the plaintiff, he acknowledged that he received the receipts of third

persons, for demands placed in their hands for collection by the plaintiff. In relation to these the Court was asked to charge the jury, that the receipts of other persons given by them to the plaintiff for notes, &c. for collection, in the absence of all other proof than that the persons giving such receipts were solvent, are not sufficient to charge the defendants with a liability on account of the receipts. In answer to which the Court charged the jury, that if the intestate received and receipted for receipts, he thereby engaged to demand settlements of the parties who gave them, or to sue if necessary; and if he failed to do this and the persons giving such receipts were good, he was guilty of gross negligence for which the defendants are liable.

6. That negligence is not to be presumed, but must be shown affirmatively by the plaintiff, and in the absence of proof to the contrary, the jury should rather presume intestate had done his duty in collecting the notes that were collectable, and paying over the amount according to instructions. Which charge the Court refused to give, but charged the jury, that as an abstract proposition, negligence was not to be presumed, yet if an Attorney receive notes, &c., on solvent individuals, and fail to sue, and use the proper means for their collection, he is guilty of gross negligence, for which he is liable, and his personal representatives after him; and it was incumbent on the defendants to show that suits were instituted on the notes, &c. and the proper means employed for their collection.

The jury found a verdict for the plaintiff below, for two hundred and seventy-five dollars and sixty-two cents, on which judgment has been rendered.

CHILTON, for the plaintiffs in error. The plaintiff in his declaration charges the defendants' intestate with negligence, and he must prove it. In the absence of such proof, it will be presumed, that the intestate performed his duty according to law. [Phil. Ev. 156.] It is a rule of universal application, extending to all the relations in society, that every one shall be presumed to have discharged his legal and moral obligations until the contrary is shown. [Bank U. S. v. Dandridge, 12 Wheat. Rep. 60, 70; Calvin v. Carter, 4 Ohio Rep. 354; Fridge v. The State, 3 Gill. & Johns. Rep. 103; Whittlesey v. Starr, 8 Conn.

Mardis' Admr's. v. Shackelford.

Rep. 134; Truwhit v. Dupree, 2 Car. & P. Rep. 557.] The intestate had paid out as the proof shows, near twelve thousand dollars, and the charitable inference is, that that was all he had, or could collect. "*Odiosa et inhonesta non sunt praesumenda.*" "*Injuria non praesumitur.*" [Hartwell v. Root, 19 Johns. Rep. 345; see also, 3 East Rep. 192; 10 id. 216; Shilcock v. Passman, 32 Eng. C. L. Rep. 512; 2 Phil. Ev. C. & H's notes, 298, 478.]

He also insisted upon all the points raised upon the record, as having been improperly ruled.

RICE, for the defendant in error. That negligence is not to be presumed, is a principle which is not denied, but it is insisted that the evidence shows a want of due diligence. Notes, &c., are placed in the intestate's hands more than a half dozen years before his death, on solvent persons, and if he did not collect them, the inference is conclusive that he was guilty of neglect.

The law is careful to guard the client against the superior professional skill of his Attorney. [Paley on Agency, 5, 403, 406.] An Attorney can't delegate his authority, so as to divest himself of responsibility to his client.

The counsel answered at length the points presented for the plaintiff in error.

COLLIER, C. J.—It is supposed by the counsel of the plaintiffs in error that the demurrer should have been sustained to the third count of the declaration; because, as he insists, it is both in *assumpsit* and *case*. This argument cannot be maintained. The count alleges, that the intestate, as an Attorney at Law, undertook to collect sundry notes and accounts, and concludes that he negligently failed to perform his undertaking, &c. True, in failing to perform his promise, he is charged with "contriving to deceive and defraud;" but these words are mere expletives, and add neither force or beauty to the sentence in which they are found. *Mr. Chitty* furnishes the form of a declaration in a case similar to the present, which states a breach as follows: "Yet the said C. D. well knowing the premises, but not regarding his duty as such Attorney, nor his said promise, &c., but contriving, and craftily and subtly

intending, wrongfully and unjustly, to delay and injure the said A. B. and to deprive him of the means and opportunity of recovering the said sum of money, did not, nor would, &c. but on the contrary thereof, he, the said C. D. so carelessly, negligently and improperly behaved and conducted himself, in, &c. that by and through the carelessness, negligence, delay and improper conduct of the said C. D." &c. [3 Chitty's Plead. 166.] The terms employed in the form from which we quote are no less potent in alledging impropriety of intention and conduct on the part of the Attorney, than are the words used in the declaration in the case before us. And although in both, terms wholly unnecessary are inserted, they cannot change the character of the action, or affect the sufficiency of the pleading.

The most important questions in the cause arise out of the bill of exceptions and relate—1. To the admission of the evidence adduced by the plaintiff below. 2. To the charges given, or refused to be given to the jury.

1. We will consider the objections to the testimony in the order in which they are stated in the bill of exceptions. It may be premised, that at least some one or more of the counts in the declaration are adapted to the admission of the evidence objected to, if in itself it was admissible.

First—In respect to the first objection, it is not well taken. The memoranda of the intestate, as it is called, is nothing more than a receipt for promissory notes placed in his hands by the plaintiff, which he was to apply to the payment of the debts owing by a late mercantile partnership, of which the plaintiff was a member. If the intestate collected any of these notes, which he failed to appropriate according to the terms of his receipt, the plaintiff might recover the amount in an action for money had and received; the more especially as it does not appear, that the intestate came under a specific engagement to the creditors of the partnership.

Second—In the Exr's of Smedes v. Elmendorf, [3 Johns. Rep. 185,] it was held, that when evidence of a debt past due is left with an Attorney, who gives a general receipt for it, it will be presumed that he received it for collection; and in an action against him for negligence, by which the debt was lost, it is incumbent on him to show that he received it specially

and for some other purpose. The second memoranda of notes belonging to the plaintiff, is not a formal receipt, yet *prima facie*, it was intended as an acknowledgement that the notes particularly described in it, were placed in the intestate's hands as an Attorney at Law; and the legal effect of the paper is an undertaking by the intestate, that he will use due diligence to collect them of the debtors. In this view it was properly allowed to be read to the jury.

Third—The question raised by this exception is, whether the testimony admitted should have been rejected for irrelevancy. As all intendments are favorable to the decision of the primary Court, it is incumbent on the party objecting to the admission of evidence, to show affirmatively the existence of error. [Thomas v. Tanner, 6 Monr. Rep. 52; Snowden v. Warder, 3 Rawle's Rep. 101.] Hence it is said, if the Court can suppose any possible state of facts to which the testimony admitted might have been relevant, it shall be presumed that such state of facts existed; care should therefore be taken, in framing the bill of exceptions, to exclude such presumption. [3 Phil. Ev. C. & H's notes, 793; Hodges v. Crutcher, 1 J. J. Marsh. Rep. 504.] In the case before us the bill excludes any presumption on this point favorable to the admission of the evidence, by an express statement, that it recites all the proof adduced by the plaintiff.

The Court always protect the jury from the admission of irrelevant testimony, by excluding it on objection, in the same manner as it rejects other incompetent proof. Hart v. Newland, [3 Hawk's Rep. 122; Winlock v. Hardy, 4 Litt. Rep. 272.] If evidence be irrelevant at the time it is offered, it is not error to reject it, because other evidence may afterwards be given, in connection with which it would become competent. If it would be relevant in conjunction with other facts, it should be proposed in connection with those facts, and an offer to follow the evidence proposed, with proof of those facts at a proper time. [Weidler v. The Farmers' Bank of Lancaster, 11 Sergt. & R. Rep. 134; see also Clendenning & Bulkeley v. Ross, 3 Stew. & P. Rep. 267; Gee's Admr v. Williamson, 1 Porter's Rep. 320; Wiswall v. Ross & Earle, 4 Porter's Rep. 330; Innerarity v. Byrne, 8 Porter's Rep. 176; Jenkins v. Noel, 3 Stew. Rep. 60; 2 Phil. Ev. C. & H's notes, 428.]

Mardis' Admr's. v. Shackelford.

The paper to which this exception refers, does not appear in itself, or by any auxiliary proof proposed, to relate to the professional undertaking by the intestate with plaintiff, in the performance of which negligence is charged; nor can it be inferred from the evidence recited in the record, that it had any connection with that transaction. What is said in the paper in respect to the "notes sent to Philpot for Smith's horse," unless explained, is wholly unintelligible; and the acknowledgment of the receipt of a note by the intestate "to bring suit on," does not appear to have been made in favor of the plaintiff, and cannot, in the absence of all proof, be so intended. The possession of the paper might warrant the inference that the plaintiff was entitled to receive the proceeds of the note when collected; but without additional proof it will not show that he was the person with whom the contract to collect was made. Consequently the evidence was inadmissible under the counts which charge a contract between the plaintiff and intestate, by which the latter undertook to perform services for him, as an Attorney at Law.

So much of the writing as relates to the notes of the Actons and Bailey is irrelevant testimony under either count of the declaration; because, thus far, it does not tend to prove any fact put in issue. But so far as it respects the acknowledgment that "F. & Hardin's note" was left with the intestate to sue on, the paper might have been admissible under the count for money had and received, as a link in the chain of evidence, necessary to show the amount of the note described in it, or the plaintiff's title to the money collected by the intestate upon it. True, it was insufficient in itself to entitle the plaintiff to recover, yet this is no objection to it; for evidence that is pertinent, it is said, cannot be rejected because it may be necessary to adduce other proof in connection. [2 Phil. Ev. C. & H's notes, 429.] The plaintiff might have shown the amount of the note by the receipt, and then have proved an admission that it was collected by the intestate, and a direct promise by him to pay the plaintiff. The fact that such additional evidence was not offered, will not make a decision erroneous, which was legal when made. The regular course, under such circumstances, is to call the attention of the Court to

the defect of proof, by asking an instruction to the jury upon the application of the testimony and its legal effect.

Had the objection been made to so much of the writing as was inadmissible, it should have been sustained, but upon a general objection, the Court was not bound to distinguish between the legal and illegal evidence; but might admit all. [Litchfield v. Falconer, 2 Ala. Rep. N. S. 280.]

Fourth.—There are many adjudicated cases which maintain, that where the subscribing witness to a bond is dead, proof of his hand-writing is evidence of its execution; but it is quite as regular, according to the course of decision at this day, to admit the bond upon proof of the hand-writing of the obligor. Such evidence has been repeatedly recognized to be admissible and *prima facie* sufficient.

Fifth.—The letter of the intestate, informing the plaintiff that he had associated with him Mr. Moody, as a partner in the practice of law, and that the latter would attend to the collection of notes &c. of the plaintiff, which had been placed in his hands, was clearly admissible. And the receipts of Moody to the debtors for money paid to him, were evidence to charge the intestate: because the letter showed that he had the intestate's authority to receive it. The plaintiff was under no obligation to look to Moody for the money collected by him, unless he substituted him as his attorney, or after the formation of the partnership, recognized Mardis and Moody as such; in which latter case, it might be necessary to proceed against Moody as surviving partner, for money received by him, if it had not been paid over to Mardis.

Sixth.—The statute only requires that the claims against the estates of deceased persons, shall be presented to the executor or administrator within eighteen months, &c. Under this enactment, it has never been considered necessary to present the evidence by which the demand is sustained; but the mere exhibition of the account which the creditor claims to be due him from the estate, is quite sufficient.

The evidence of the identity of the account presented to one of the administrators, and that adduced at the trial, must be considered as admissible. The circumstances which induced the belief of their identity, are stated by the witness in the deposition objected to; and they are such as authorized the pa-

Mardis' Admr's. v. Shackleford.

per to be submitted to the jury. Positive evidence to the point is not indispensable.

It is not insisted that the account should have been presented to both the administrators; nor, indeed, could such an argument be successfully urged. In *Acre v. Ross* administrator, [3 Stew't. Rep. 288,] it was determined, that the presentment of a claim to one of two representatives of an estate, was a notice to both. The declaration of the administrator to whom the account was presented, that he would make good so much of the claim as had not been paid, proved nothing in an action against the administrators, as such; and as it could not prejudice, its admission was not a fatal error.

2. Several of the counts of the declaration charge the intestate with negligence as an Attorney, in failing to take the proper steps to collect notes, &c., placed in his hands, and a consequent loss to the plaintiff. An Attorney at Law is only liable to his client for gross negligence in the performance of his professional duties; and that is a question of fact to be determined by the jury. [*Evans v. Watrous*, 2 Porter's Rep. 205; 1 Saund. Plead. and Ev. 194; 2 Starkie's Ev. 134.]

The first inquiry to be made on this branch of the case is, what is sufficient evidence of negligence? The proof of negligence, it is said, must always vary, according to the statement of the facts of the plaintiff's case in his declaration; [1 Saund. Plead. & Ev. 195; 2 Starkie's Ev. 134,] but it is a fact which must be proved by him in order to make out the defendant's liability. [2 Starkie's Ev. 133; 1 Saund. Plead. and Ev. 194.] In the case before us, the Judge, in effect, instructed the jury, that the production of the receipts made by the intestate, was sufficient to warrant them in finding a verdict against defendant; unless it was shown, that in obedience to intestate's undertaking, he had brought suit upon the claims in his hands, and used the proper legal means for their collection. And upon the prayer of the defendants, the Court refused to charge the jury, "that the production of receipts of intestate with proof that the persons named therein were solvent, in the absence of all other proof in regard to liability upon those receipts, is not sufficient to entitle the plaintiff to recover thereupon."

The receipts of the intestate merely evidenced that demands

such as are described in them, were placed in his hands; and the law implied a promise on his part that he would employ due diligence in their collection. This implied undertaking was, however, subject to modification by instructions from the client. But as the instruction to the jury was given upon the hypothesis, that the intestate was not controlled in the performance of his duties by the plaintiff, we will, for the purpose of testing its correctness, consider such to have been the fact.

It is difficult to conceive by what course of reasoning, the intestate's neglect was deducible from the mere production of his receipts. These, we have seen, proved nothing more than the fact of retainer. To establish negligence *prima facie*, it should have been shown that the intestate was aware of the residence of the debtors, or upon due inquiry might have been informed on this point. Then, *the great length of time* which had elapsed since the receipts were given, in the absence of all countervailing proof, would warrant the inference that the intestate had omitted to use due diligence. If any of the debtors resided beyond his reach, and he desired to relieve himself from the responsibility of taking legal steps against them, or if he had collected, or failed to collect, the demands against them, he should have informed the plaintiff. The failure to give information would authorize the implication that the intestate was willing to continue his professional engagement, and that he had collected, or neglected to collect, the debts in his hands.

The measure of the damages to which an attorney is liable for the failure to perform his undertaking with his client, is the loss which has resulted from his negligence. [2 Starkie. Ev. 135; 1 Saund. Plead. and Ev. 196.] But the question, on whom does the *onus* lie to prove the damages for neglecting to collect a debt which is liquidated by note, or whether the *prima facie* inference is not, that the damages sustained are commensurate with the amount of the note, has been sometimes seriously mooted. In *Bourne v. Diggles*, [2 Chit. Rep. 311,] it was said that the defendant must show that diligence would have been ineffectual. [But see *Wilcox et al. v. Plummer's Ex'ors.* 4 Pct. Rep. 172; *St. John v. O'Connell*, 7 Porter's Rep. 466; *The Bank of Mobile v. Huggins*, Adm'r. 3 Ala. Rep. N. S. 206.] What may be the rule of law on this point, it is un-

necessary to determine, as the plaintiff undertook to prove the solvency of the debtors, and will doubtless be prepared upon another trial to adduce the same evidence. From this view of the law, it follows that the court erred in the instruction we have noticed, as well as in the refusal to charge as prayed.

By giving his receipts for the receipts of third persons, for notes, &c. belonging to the plaintiff, the natural conclusion is, that the intestate undertook to supervise the collection of the notes, &c. and to make settlements with the persons who held them; and if he neglected to perform that duty, to the prejudice of the plaintiff, he would be chargeable. Whether the declaration is adapted to such a cause of action, may perhaps be questioned; but as this point is not raised upon the record, we will not undertake its solution.

If the intestate collected money in his professional character for the plaintiff, an action would not lie against his administrators for its recovery, until after demand made. But, as remarked by the circuit judge, the direction by the plaintiff and assent by the intestate, to pay over the sums received, to the creditors of the former, dispensed with a formal demand, and the failure thus to appropriate the money, entitled the plaintiff to his action. [Taylor v. Bates, 5 Cow. Rep. 376; Ferguson's case, 6 Cow. Rep. 596; Rathbun v. Ingalls, 7 Wend. Rep. 320; Taylor v. Armisted, 3 Call's Rep. 200; Staples v. Staples, 4 Greenl. Rep. 533.]

In respect to the statute of limitations, it may be regarded as settled law, that it began to run from the time the intestate was chargeable with negligence; for then a right of action accrued in favor of the plaintiff. For the purpose of ascertaining that time, we must again recur to the contract of the parties. Supposing it to have been what the charge to the jury assumed, it imposed upon the intestate the duty of bringing suits upon the notes and accounts which he received, to the first court to which, with reasonable diligence, they could be brought. The failure, thus to proceed, without an excuse therefor, would have been such negligence as made him liable to an action at the suit of the plaintiff.

The question, at what time the statute of limitations begins to run in favor of an attorney who was charged with negligence, was well considered in Wilcox et al. v. Plummer's Ex'rs.

Mardis' Admr's. v. Shackelford.

[4 Pet. Rep. 172]. In that case an action of assumpsit was instituted against the testator of the defendants, on the 27th of January, 1825, and upon his death revived against his executors. It was proved that a promissory note was placed in the testator's hands for collection, by the plaintiffs, on which he brought a suit on the 7th February, 1820, against the maker, but neglected to sue the indorser. The maker proved insolvent; and then, on the 8th February, 1821, he issued a writ against the indorser, but committed a fatal misnomer of the plaintiffs, and a judgment of nonsuit was rendered against them. Before the plaintiffs were nonsuited, an action against the indorser was barred by limitation.

The declaration contained two counts: the one laying the breach in not suing until the note became barred; the other laying the breach in the mistake in the plaintiff's name; but both placing the damages upon the barring of the note by the act of limitations.

The Court say, "The only question in the case is, whether the statute runs from the time the action accrued, or from the time that the damage is developed or becomes definite. And this we hardly feel at liberty to treat as an open question. The ground of the action here, is to act diligently and skilfully; and both the contract and the breach of it, admit of a definite assignment of date. When might this action have been instituted, is the question; for from that time the statute must run. When the attorney was chargeable with negligence, or unskilfulness, his contract was violated, and the action might have been sustained. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the *damage* is not the cause of action." The Court then conclude, "that on the first count in the declaration, the cause of action arose at the time when the attorney ought to have sued the indorser, which was in a reasonable time after the note was received for collection, or, at all events, after the failure to collect the money from the maker. And that, on the second count, his cause of action arose at the time of committing the blunder in issuing

the writ in the names of the wrong plaintiffs." There was no necessity for the Court to be more explicit in the conclusion, as it was obvious, from the proof, that the statute pleaded operated a bar to a recovery upon either count. [See also, *Benton v. Craig*, 2 Missouri Rep. 198. *Shff. of Norwich v. Bradshaw*, 1 Cro. Eliz. 53. 2 Saund. on Plead. and Ev. 645, and cases there cited.

In the case at bar, the Court very properly refused to charge the jury that the statute of limitations began to run from the date of the receipts; but in charging that it did not begin to run until the intestate had a reasonable time to collect the notes, &c. and from the time his responsibility commenced, the Court misapprehended the law. It is true that the statute began to operate as soon as the intestate was liable to an action for negligence, but that liability we have seen attached as soon as he failed to perform his contract, that is, upon a neglect to sue in a reasonable time; which must have happened before he could have collected the notes, &c. according to the regular course of proceeding at law. Whether the statute really did perfect a bar before the suit was instituted, or whether there is anything in the record to relieve the case from its influence, are questions which are not presented for our decision.

The bill of exceptions is drawn out to an unnecessary length, and is calculated, by its prolixity, to embarrass rather than aid our examination of the points made. We mention this, as a suggestion to counsel, of the propriety of only placing upon the record such matters as are essential to a decision of the case.

It remains but to add, the judgment is reversed and the cause remanded.

HESTER, WILSON, WHITE & Co. v. LUMPKIN.

1. Four persons constituting a firm in Tuscaloosa, afterwards established a new firm composed of themselves and eleven others, which was located under different names in Tuscaloosa, Mobile and New York. The old firm, before its dissolution, was indebted to the plaintiff, and to discharge this debt the acting partner of the house at Mobile, and who had been one of the old firm, drew a bill on the branch at New York, which was accepted by the acting partner there, who had also been one of the old firm. At the time the bill was drawn, the new firm was indebted to the members of the old firm in a large amount for goods sold, and at that time there stood also on the cash account of the house at Mobile, to the credit of the members of the old firm, a sum sufficient to cover the amount of the bill drawn: Held, that this was not the case of one partner giving the security of the firm for his individual debt, but that it was like any other case of indebtedness on the part of a firm, which any member of it could discharge by a payment in money, or by giving a security in its name.
2. A second deposition may be taken without leave of the Court first obtained for that purpose, but cannot be read to the jury but by leave of the Court, which would not be given but upon a proper showing, and also producing and confronting the first with the second deposition. Such permission is matter of discretion, and cannot be reviewed in this Court.

ERROR to the Circuit Court of Tuscaloosa.

Assumpsit by defendant in error against the plaintiffs in error as acceptors of a bill of exchange for twenty-seven hundred and twenty-nine dollars seventy-six cents, drawn on them by McCown, Hobson, Williams & Co. on the 13th March, 1839, at four months, in favor of Samuel B. Ewing.

To a declaration in the usual form, the defendants plead—
First—Non assumpsit.

Second—That the bill of exchange sued on was not their act, or accepted by their authority.

Third—That the bill was drawn by A. McCown, in the name of the firm of McCown, Hobson, Williams & Co. and accepted by Guilford R. Wilson, in the name of the firm of Hester, Wilson, White & Co.—that the bill was given by A. McCown in liquidation of a debt due by the firm of A. McCown & Co. to the said Robert Lumpkin—that the said firm of A. McCown & Co. was composed of Alexander McCown,

Hester, Wilson, White & Co. v. Lumpkin.

Charles M. Conrow, Benjamin S. Wilson and Guilford R. Wilson. That at the time the said bill was drawn and accepted as aforesaid, and at the time and before the said bill was endorsed to the said Robert Lumpkin, the said Ewing and the said Lumpkin respectively, had notice that the said bill was drawn and accepted for the debt of the said A. McCown & Co. and not upon a consideration to the said firm of McCown, Hobson, Williams & Co. or the said firm of Hester, Wilson, White & Co. and this the said defendants are ready to verify, &c.

These pleas are all sworn to, and issue being taken thereon, the plaintiff had a verdict and judgment.

By a bill of exceptions it appears that the plaintiff proved the drawing of the bill in the hand-writing of A. McCown, and its acceptance in the hand-writing of Guilford R. Wilson, and rested his cause.

The defendants then read in evidence a deposition of one George Haig, which had been taken by the plaintiff.

The plaintiff then offered to read the deposition of the same witness taken subsequently, to the reading of which the defendants objected, because it was taken without any special order or leave of the Court, and was not rebutting testimony but the Court overruled the objection and permitted it to be read. By this deposition, and a witness examined for the defendants, it was proved that the defendants in this suit, fifteen in number, were partners, doing business in Tuscaloosa under the name of Conrow, Ramsey & Co.—in Mobile under the name of McCown, Hobson, Williams & Co., and in the city of New York by the name of Hester, Wilson, White & Co. That previous to the formation of this Company, there existed a mercantile concern, doing business in Tuscaloosa under the style of C. M. Conrow & Co. and in the city of Mobile under the name of A. McCown & Co. which consisted of A. McCown, Charles M. Conrow, Benjamin S. Wilson and Guilford R. Wilson, part of the members of the firm first above described. That before the formation of the new firm the old firm of A. McCown & Co. were indebted to the plaintiff, and in discharge of this debt the bill in question was drawn by the house in Mobile, on the house in New York. The bill was drawn by the direction of A. McCown and accepted by Guilford R. Wilson, who was

Hester, Wilson, White & Co. v. Lumpkin.

the acting partner of the New York branch. That at the time the bill was drawn there stood to the credit of Alexander McCown & Co. on the cash account of McCown, Hobson, Williams & Co. a sum sufficient to cover the amount of the bill of exchange, and in addition the firm of A. McCown & Co. then held the notes of McCown, Hobson, Williams & Co. for about thirty thousand dollars, given for the purchase of a stock of goods of the former at Tuscaloosa.

After the formation of the last mentioned firm, several of the partners were in Mobile, and frequently at the counting house of the Mobile concern, had access to its books, &c. A. McCown was the acting partner at Mobile.

Upon this testimony the defendants insisted that they were not liable on the bill, if the jury believed it was given for the debt of the old firm of A. McCown & Co. unless the bill was given and accepted with the knowledge and consent of the defendants who filed the special pleas, or unless they assented to the transaction after the bill was made and accepted, as aforesaid.

The Court charged the jury that the principle contended for by the defendants, was correct as a general rule, but that there were exceptions to it. That if there were large funds in the hands of the new firm, and the new firm tacitly recognized the debt, then the defendants would be liable. That if the jury were satisfied that the old firm deposited sufficient funds in the hands of the defendants, and the same were used by them, then the defendants became liable to pay the bill—to which the defendants excepted.

Judgment being rendered for the plaintiff, the defendants prosecute this writ, and assign for error—

1. The admission of the deposition of Haig in evidence.
2. The matters arising out of the bill of exceptions.

CRABB & COCHRAN and PECK, for plaintiff in error, cited 1 East, 48; 2 Ala. Rep. 502.

THORNTON, contra—Story on Partnership, 199, §133; 14 Wendell, 140; 8 Vesey, 540.

ORMOND, J.—It is admitted by the counsel for the plain-

Hester, Wilson, White & Co. v. Lumpkin.

tiff in error that a deposition may be taken more than once by leave of the court first obtained, and we are unable to perceive any material distinction between that case and the present, as the same reasons which would influence the Court to grant or refuse leave to retake the deposition, would operate to cause its admission or rejection when offered to be read, and the taking of it in advance would speed the trial of the cause. In either case, whether a motion was made for leave to retake the deposition, or to read it on the trial without such leave first obtained, the Court would take care that the party against whom it was offered to be taken or read, was not improperly prejudiced thereby—and that the right was not capriciously exercised. The subsequent deposition could also be confronted with the first, and any material departure therefrom, or contradiction therein, would impeach the credit of the witness. Indeed, it can scarcely be conceived that in any case such additional deposition could avail beyond what would be allowable on the second examination of a witness *viva voce*, who could not be examined a second time, without leave of the Court, and whose contradiction of his testimony first given in, or material departure from it, would destroy his credit with the jury. The whole matter is in the discretion of the Court, and cannot be revised on error.

The material question in the cause is, whether the bill is invalid, because, as alledged, given to discharge the individual debts of a part of the members of the firm, on which it was drawn and without the knowledge or consent of all the members of the firm.

The general principle, that one partner cannot, without the assent of his co-partners, give a security in the partnership name, for his individual debt, is universally acknowledged. [Mauldin v. The Branch Bank at Mobile, 2 Ala. Rep. 502.] That proposition was distinctly admitted by the Court below, in its charge to the jury, in this case—and the case put to the jury upon the implied assent of the new firm to pay this debt.

The facts of the case were, that the defendants in this suit, fifteen in number, were partners, doing business in Tuscaloosa, under the name of Conrow, Ramsey & Co.; in Mobile, under the name of McCown, Hobson, Williams & Co.; and in the

Hester, Wilson, White & Co. v. Lumpkin.

city of New York by the name of Hester, Wilson, White & Co. That previous to the formation of this Company, there existed a mercantile concern, doing business in Tuscaloosa of C. M. Conrow & Co. and in the city of Mobile of A. McCown & Co. which consisted of four persons who constituted a part of the firm first mentioned. That before the formation of the new firm the old firm of A. McCown & Co. were indebted to the plaintiff, and in discharge of this debt, the bill in question was drawn by the house in Mobile, on the house in New York and accepted by the acting partner of the latter. At the time the bill was drawn there stood to the credit of the old firm of A. McCown & Co. on the cash account of the Mobile house, a sum sufficient to cover the bill of exchange, and in addition the new firm was indebted to the old, about thirty thousand dollars, the purchase of a stock of goods, for which the persons composing the former held the notes of the latter. A. McCown was the acting partner at Mobile.

Upon this testimony the Court admitted the general rule to be as stated, instructed the jury that if there were large funds in the hands of the new firm, and the new firm tacitly recognized the debt, then the defendants would be liable. That if the old firm deposited sufficient funds in the hands of the defendants, and the same was used by them, then the defendants were liable to pay the bill.

From the proof it appears that the new firm was indebted to the old firm in a sum more than sufficient to pay the amount for which the bill was drawn, and we can perceive no possible objection to the drawing of the bill, as it was merely a mode of paying a debt which the house owed. The apparent difficulty arises in this case from the fact, that the members of the old firm to whom the debt was due, were also members of the new firm, for if the new firm had been indebted to a stranger, it cannot be doubted for a moment that any member of it, had authority to discharge it by a payment in the money or effects of the firm or by drawing a bill upon its credit. But although the new firm was composed in part of the members of the old firm, yet the liability of the former to the latter was as distinct as if the debt had been due to a stranger.

At the time this bill was drawn the Mobile branch of the

Hester, Wilson, White & Co. v. Lumpkin.

new firm had cash in its possession belonging to the old firm sufficient to pay this debt, and it cannot be doubted that the money could have been appropriated to its payment by the acting partner of the house. What difference is there then between this state of things and the course pursued. The right to draw the bill payable at a future time must rest on the same principle as the right to appropriate the money; for one partner can no more pay his debts by transferring the effects of the firm without the assent of his co-partners, than he can charge them, without their consent, by drawing a bill against the firm for that purpose, and in either case it would make no difference, whether the separate creditor had or had not knowledge of the misapplication of the partnership funds. [See the case of Rogers v. Batchelor, [12 Peters, 229,] in which the Court held the following language in reference to the right of one partner to pay his individual debt out of the partnership effects. "In the case of a partner paying his own separate debts out of the partnership funds, it is manifest that it is a violation of his duty and of the rights of his partners, unless they have assented to it. The act is an illegal conversion of the funds, and the separate creditor can have no better title to the funds than the partner himself had."

That McCown, the acting partner at Mobile, could have drawn the money from the possession of the firm and paid the debt for which this bill was drawn, cannot be controverted, and is indeed admitted in argument. But on what principle could this be done? On no other than that it was legitimate, because by receiving the money the house became indebted to those depositing it with them, and being a debt due by the firm, any member of it could discharge it.

It was also urged that although there might be cash dealings between the old and new firms, so as to create at a given time the relation of debtor and creditor between the two, that, in the nature of things this balance would fluctuate, and be constantly changing, and that therefore, although the new firm, might be indebted to the old when the bill was drawn, there might be no such indebtedness when the bill matured. But the presumption must be, as the contrary is not shown, that when the bill was drawn, it was carried to the debit of the old firm, and thus extinguished such indebtedness *pro tanto*. The

argument, if carried out would prove too much, as it would lead to the conclusion that a debt due by the firm could not be extinguished by a bill. The house, although established in three different places, is, in law, but one firm, and doubtless each of the branches kept the other apprised of their monied transactions. But if any inconvenience or difficulty should arise from this cause, it is one proceeding from the fact that the firm was located in three different places, an arrangement designed for the benefit of the firm, to enlarge the sphere of its operations and increase its credit, and if any inconveniences result from it, they must be borne by those interested in it and benefitted by it, and cannot be visited on strangers.

We have not thought it necessary to advert to the facts of the case, to establish the proposition that they raised the inference of an implied assent by the members of the new firm, who were not members of the old, to the drawing of this and similar bills in discharge of an indebtedness to the old firm, as was held in the case of *Gainsevoort v. Williams*, [14 Wendell, 133,] a case in some respects analagous to this, because, we think that this case, when stripped of its extraneous circumstances, is resolved into the simple proposition, whether each of the members of a firm have not the power, by the very terms of the partnership, to discharge its debts by giving a security in the name of the firm, or in any other manner.

As this is a proposition which cannot be controverted, it follows that there is no error in the judgment of the Court, and it is therefore affirmed.

GODBOLD ET AL V. THE PLANTERS' AND MERCHANTS' BANK OF MOBILE.

1. In a summary proceeding against a sheriff and his sureties, for the failure of the former to return a writ of *fiery facias*, the notice stated that a judgment would be moved for against them, for the amount of the judgment against the defendant in execution: Held, that the substitution of the word "judgment" for "execution," was not fatal to the notice, and would be considered good under the act of 1819—*further*, that after verdict and judgment, none other than substantial defects can be made to the notice.
2. Where the judgement entry recites the facts differently from a bill of exceptions certified in the cause; *semble*, the latter will control the former.
3. Where a judgment conforms to the verdict on which it is rendered, (though the latter is for too much,) it will not be reversed on error, but a correction should have been sought in the primary Court.
4. The official bond of a sheriff is a public document, which may be proved by a copy, certified by the Clerk of the County Court, in whose office it is directed by law to be deposited; it is no objection to the authentication that the attestation was made by the Clerk through his deputy, who certified the copy under his private seal, affirming that the public seal was lost or mislaid.
5. In a summary proceeding under the statute against a sheriff, &c., for failing to return an execution, the plaintiff need not produce the judgment on which it issued, but the sheriff may resist a recovery, by showing either that there is no judgment or it is void.

WRIT of Error to the County Court of Mobile.

This was a proceeding under the statute, by notice and motion against the Sheriff of Monroe and his sureties, for the failure of the former to return a writ of *fiery facias*, which had issued from the County Court of Mobile, and been placed in his hands, against the goods and chattels, lands and tenements, of Cornelius D. Tobin, L. J. Moore, Nathan Jenkins, and J. R. Moore, for the sum of \$977 14-100, besides \$17 06-100 costs. In the notice found in the transcript, the times of the test and return of the execution are particularly stated, also its due delivery to the Sheriff. It also informs them, that a motion will be made for a judgment against them, on the second Monday of a term of the County Court, commencing on the second Monday in June, 1841, "for the amount of the judgment and costs as aforesaid, recovered by said Bank against Cornelius Tobin," &c.

Godbold et al v. The Planters' and Merchants' Bank of Mobile.

On the fifteenth of March, 1842, a judgment was rendered against the defendants in the motion. The judgment recites that it appeared to the satisfaction of the Court, that the defendants received due notice of the motion, &c., reciting the time when, the amount of the execution, the parties to it, when delivered to the Sheriff, &c.; and also that the notice indicated that a judgment would be moved for, *for the amount of the fieri facias*. The judgment proceeds to state that the parties appeared by their attorneys, and the case was submitted to a jury, to whom the same facts were proved, that were shown to the Court. A verdict was found for the plaintiff, for the sum of eleven hundred and twenty-nine (20-100) dollars, being the amount of the execution with interest from its test; and judgment was rendered accordingly.

On the trial, the defendants excepted to the ruling of the presiding Judge: 1. For admitting a copy of the official bond of the Sheriff in evidence, which was certified as follows:—

“ *The State of Alabama,* } I, James McColl, Clerk of the
 Monroe County. } County Court of said County,
 do hereby certify, that the foregoing is a true and correct copy
 of the original bond of William G. Godbold, as on file in my
 office.

Given under my hand and private seal, (the public seal having been lost or mislaid,) this 13th day of February, A. D.
 1840.

JAMES MCCOLL, Clerk, [*Seal.*]

By SAMUEL MCCOLL.

2. For refusing to charge the jury, that if no record of the judgment referred to in the notice, was given in evidence to the jury, then they should find a verdict for the defendants.

3. In charging the jury, that if they were satisfied from the proof, that the execution was in the hands of the Sheriff, and that he failed to make return thereon as required by law, they should find for the plaintiff.

J. GAYLE, for the plaintiffs in error. The notice informed the defendants below, that a judgment would be asked, for the amount of the judgment in favor of the Bank against Tobin and others; but the judgment entry mis-recites the notice, in saying it states the judgment will be sought for the amount of

Godbold et al v. The Planters' and Merchants' Bank of Mobile.

the execution; and upon this latter supposition the judgment of the County Court was rendered.

The judgment entry and bill of exceptions are contradictory of each other, the former stating a fact to be proved, which the latter seems to negative. Again: the Court erred in refusing the charge prayed and in the charge given, as also in receiving as evidence the copy of the Sheriff's bond.

GIBBONS, for the defendant. The errors assigned cannot be maintained. They are at best very technical, and if in any case they were available, certainly not where an issue had been tried by a jury. The decisions of this Court, it is believed, are conclusive to show the absence of error.

COLLIER, C. J. 1. It cannot be objected to the notice that it informed the defendants below, a judgment would be moved for against them, for the amount of the judgment recovered by the Bank against Tobin, &c. instead of the execution; for if, (as has been repeatedly adjudged,) the failure of a Sheriff to return a *feri facias*, subjects himself and sureties to a recovery equal to its amount, their liability is quite as extensive as the notice sought to enforce. The substitution of the term "judgment," for "execution," can exert no prejudicial influence, and the proceeding must be considered as having been commenced in reference to the act of 1819. Again: an issue was made up and tried by a jury, although the record does not inform us what that issue was, we are authorized to infer from the verdict and judgment, that it was a negation of the facts stated in the notice. This being the case, no objection to the notice that does not show it to be substantially defective, can now be entertained; the appearance and plea of the defendants operating to cure all such defects.

2. The judgment entry is drawn out to an unusual length and with unnecessary particularity, considering the judgment is rendered upon a verdict: yet this, it is conceived, cannot work an injury to any one. The view we have taken of the notice, shows that its mis-recital in the judgment, is a mere verbal error which cannot prejudice the rights of either party; and the statement that the judgment against Tobin, &c. was produced at the trial, is equally harmless; for the bill of exceptions, certifying the reverse to be true, would control the recital

in the judgment entry, if any prejudicial consequences could result from it.

3. In respect to the amount for which the judgment is rendered, it may be remarked, that it conforms to the verdict. At the conclusion of the judgment, it is stated, that the items composing it are, "the judgment on which said writ of *fiери facias* was issued, with interest from the date thereof and its costs," &c. It has been holden, that where a judgment on a verdict conforms to it, though the latter be for too large a sum, yet it will not be reversed on error, but a correction should have been sought in the primary Court. [1 Por. Rep. 280.]

4. The official bond of a Sheriff is required by law to be deposited in the office of the Clerk of the County Court of his County, and is such a public document as is not subject to removal (under ordinary circumstances) from place to place where it may be wanted as evidence; but a sworn, or certified copy, is admissible as a substitute for the original. [Miller v. Gee, at this term.]

But it is insisted, that the attestation of the copy offered to the jury, is insufficient. We cannot think that this argument is well founded. The deputy clerk, if duly qualified, possessed the authority to certify the transcript in the name of his principal; and his qualification, in the absence of all evidence to the contrary, must be presumed to have been regular.

The attestation, it is true, is unusual in stating that the official seal of the clerk was lost or mislaid. The official acts of a Clerk, which are to be used as evidence elsewhere than in his own Court, should in general be attested by his seal of office, if he have one. In the case before us, the form of the attestation would indicate that there was a seal pertaining to the office, which it is affirmed was lost or mislaid. This affirmation serves to show that at the time the transcript was made, there was no seal that could be used, and we think this authorized the use of the private seal of the Clerk, and that it sufficiently authenticated the paper. The opposite conclusion might seriously affect individual rights, and even the public interest, by preventing the attestation of documents important to both.

5. The production of the judgment on which the execution issued, we think, was not essential to the plaintiff's right to recover. Other evidence of the amount of the execution was

Godbold et al v. The Planters' and Merchants' Bank of Mobile.

admissible. In *McWhorter et al. v. Marrs*, [Minor's Rep. 376,] the Court say, "The official entries and information of the Clerk, are by law, evidence of the issuing and delivery of the execution." Again: "If the execution issued from competent authority, and was duly authenticated, it was not for the Sheriff in defence of the rule, to say that the execution was irregular, or to know whether it was founded on a proper judgment or not. Its mandate was imperative, and he was bound to obey it." [*Anderson v. Cunningham*, Minor's Rep. 48. See also *Neale et al. v. Caldwell*, 3 Stew't. Rep. 134.]

The correct rule on this point, we think, is this: Where the execution issues upon a judgment which is so far valid, as to justify the Sheriff in executing it, he cannot be permitted to object that it is irregular and voidable; but where the judgment is so utterly void as to afford no warrant to the officer for obeying the mandate of an execution, he may successfully defend himself against a motion for failing to return it, by proving, either, that there is no judgment, or it is void. The plaintiff, however, need not refer to the judgment, but may make out his case by other legal proof.

The bill of exceptions does not negative the introduction of ample evidence to sustain the motion, and we understand the objection was not to the want of other proof, but to the absence of the judgment. In this view, we have seen the instruction was correctly denied.

The charge given is unexceptionable. It merely asserts the right of the plaintiff to recover if the execution was placed in the Sheriff's hands, and not returned *as required by law*. The latter part of the charge shows, that it must have been delivered to the Sheriff when it was operative; otherwise, the law made no requisition upon the Sheriff for its return.

We have repeatedly expressed our regret that the earlier decisions of this Court had given to the Act of 1819, a construction so highly penal against Sheriffs, &c. for the failure to return executions. But this construction commenced too long ago, and has been too often recognized to allow us to depart from it. The doctrine of *Stare decisis*, forbids that we should make any footsteps backwards.

The judgment must be affirmed.

GOLDTHWAITE, J. not sitting.

DEARMAN v. DEARMAN AND COFFMAN.

1. A father and son join in a conveyance of slaves, the property of the son, to another son, with an understanding that the transferee should hold the slaves during his life, or until the children of the father come of age, and then to be divided among those children. The conveyance was made from the apprehension that the creditors of the father, who had once owned the property, would seize it for his debts—Held that if the slaves were not liable for the debts of the father, such an agreement, though it might be suspicious, would not necessarily be fraudulent.
2. The administratrix of the transferee having divided the slaves according to the agreement, and delivered them to those entitled, a part of whom were left with her to assist in gathering the crop, and which she afterwards refused to deliver, in an action against her for the recovery of the slaves—Held, that if the original agreement to divide the slaves was fraudulent, the division made by her was void; but if the agreement was *bona fide*, the division was good, as she was merely doing voluntarily what a Court of Chancery would have compelled her to do.
3. An administratrix cannot dispose of the property of the estate by *private sale*, and such a sale, though for a full consideration, will be void as against heirs, distributees and creditors.

ERROR to the Circuit Court of Sumter.

Trover by the plaintiff against the defendants in error for two slaves.

The plaintiff, William Dearman proved on the trial, that his father, one Jonathan Dearman, gave him, in 1812, in exchange for another negro, a negro woman named Lucy, the mother of the negro woman Dice, and grandmother of the boy Sidro, sued for in this action, both of whom were born after the exchange—that plaintiff and his father lived together until about the year 1818, when they removed to Florida, carrying with them the negro woman Lucy and her children—that the slaves remained in Florida, in possession of plaintiff, his father and himself still residing together, until the year 1830, when, the the plaintiff manifesting a desire that Solomon Dearman, a brother of the plaintiff, and then husband of the defendant, Anna Dearman, should bring the slaves to Alabama, but fearing that they might, if brought to Alabama, be seized as the

Dearman v. Dearman and Coffman.

property of Jonathan Dearman, who was in embarrassed circumstances, he conveyed the slaves to Solomon by an instrument in writing; it being understood at the time that Solomon was to retain the possession of the slaves until his death, or until the coming of age of all the children of Jon. Dearman, when the slaves were to be divided between them equally. That upon this arrangement being made, the slaves were removed from Florida in the spring of 1832, and in the fall of that year Solomon removed his family to Sumter county, and took possession of the slaves, and retained them until his death, in July, 1838, that defendant, upon the death of her husband, administered on his estate, having the slaves in her possession, and returned them to the Orphans' Court as part of his estate.

The plaintiff also proved that shortly after she so administered, she consented and agreed with one Thomas Dearman another brother of the plaintiff, and Solomon, that the slaves should be divided according to the agreement previously mentioned, and that three persons were selected to make the division, who accordingly met, and all those interested being present, made an equal division of all the slaves among the children of Jonathan Dearman and the defendant. That the slaves were delivered severally to those to whom they were assigned, and the slaves sued for in this action were assigned and delivered to the plaintiffs, who then consented that they might remain for the purpose of assisting to get out the crop then growing on the plantation of the deceased—that defendant expressed herself satisfied with the division of the slaves, and admitted she had done wrong in retaining the slaves as part of the estate of the deceased. It was also proved that Solomon, in his lifetime, had refused to sell one of the slaves so divided, admitting that he could not make a good title without the consent of the children of Jonathan.

The defendant proved that Thomas Dearman came to the house of deceased and threatened to carry off all the slaves, and that after some altercation she agreed to the division. The defendant also produced a bill of sale from the plaintiff and Jonathan Dearman to the deceased, for all the slaves, dated 9th September, 1830, which was without condition and recited the consideration of thirteen hundred dollars. The defendant also proved that shortly after the bill of sale was made

the plaintiff admitted he had sold his negroes to Solomon Dearman for thirteen hundred dollars and a horse he was then riding, worth two hundred dollars, and that the money had all been paid, that he sold the negroes because they were a burthen to him, and he could do better with the money.

Upon this evidence the Court charged the jury, that unless the division of the slaves was founded upon a valuable consideration, it was void, and that they should so consider it—to which the plaintiff excepted.

Judgment was rendered for the defendants, and the plaintiff now assigns for error the charge of the Court.

J. B. CLARK, for plaintiff in error, argued that the charge was erroneous, that it referred to the jury to determine what was a valuable consideration, and that there must be a valuable consideration to sustain the division. [16 Mass. 427; Chitty on Con. 10; 1 Bibb, 160.]

He maintained that no consideration at all was necessary, as the division was consummated by a delivery. [2 Bl. Com. 441, 443; 24th Pickering, 261.]

SMITH and JONES, contra, insisted that there was no consideration whatever to support the division.

That the slaves were held by the defendant as administratrix, and that the division was a breach of her trust, which, being known to the plaintiff, he could acquire no right under it. The statute points out the only mode by which an administratrix can sell. [10 Peters, 161.]

ORMOND, J.—The bill of exceptions found in the record contains a great deal of superfluous matter—the material facts may be thus shortly stated :

The two slaves in dispute, with some others, were, by a bill of sale executed in Florida, in 1830, by Jonathan Dearman, the father, and the plaintiff William, his son, conveyed to Solomon, another son, and husband of the defendant, Anna Dearman, upon the consideration, as expressed in the bill of sale, of thirteen hundred dollars. It further appears, that at the time of the conveyance there was a parol agreement that Solomon should retain possession of the slaves until his death, or

until all the children of his father, Jonathan, came of age, when the slaves were to be equally divided among the children of Jonathan. Evidence was offered conducing to show that the slaves were brought to Alabama, and the conveyance made to Solomon, that he might be able to protect them if seized as the property of Jonathan, the father, although it appears that the title to the slaves was in William, having been acquired by him by exchange with his father as far back as 1812. It does not appear that the consideration was paid, except by the acknowledgement of William.

The negroes were sent to Alabama in the spring of 1832, and Solomon followed and took possession in the fall of that year, and retained possession until 1838, when he died, and the defendant, Anna Dearman, administered and returned the slaves to the County Court, as the property of the estate.

Some time after, the brothers of the deceased claimed a division of the slaves, which, after some altercation was agreed to by the administratrix, and a division made, and the slaves delivered, the two sued for in this action being assigned to the plaintiff, who suffered them to remain to assist in getting out the crop. The administratrix afterwards refused to deliver them, and this action is brought for their recovery.

It is insisted that this was a combination between the brothers to delay, hinder and defraud the creditors of Jonathan Dearman, and that no right can be derived from so impure a source which can be enforced in a Court of law. If it be true that the sale to Solomon was merely colorable, and made with the intent supposed, although it would be utterly void as to those designed to be defrauded by it, it was binding on the parties to the agreement, and all claiming through them, and Solomon took the property discharged from the performance of the illegal condition.

If, however, the slaves were not bound for the debts of Jonathan Dearman, the father, although some apprehension might be felt by the family, that as he had once owned them, they might be subjected to the payment of his debts, or, in the language of the bill of exceptions, be "seized for the payment of his debts," the agreement to invest Solomon with the title to prevent this result would not be fraudulent; because, on this hypothesis, the property was not subject to the payment of

Jonathan's debts, and therefore a contrivance to prevent that result, though it might throw suspicion over the whole transaction, could not be a fraud on the creditors of Jonathan.

On the supposition that the transaction was *bona fide*, Solomon took the slaves charged with a trust, that on his death, or on the children of Jonathan Dearman coming of age, they should be equally divided between the children of Jonathan. This trust a Court of Chancery would have enforced and the administratrix might have carried into effect, as there can be no possible objection to her doing that voluntarily, which a Court of Chancery would have compelled her to do.

Although if the sale had been a fraudulent contrivance, Solomon would have taken the property discharged from the performance of the illegal condition as already stated. Yet, if he had executed the contract by dividing the slaves, it would have been binding on him. For although the law will not enforce a fraudulent executory contract, yet if it be *executed*, and the parties are in *pari delicto*, the law will not interfere between them. [Rochelle v. Harrison, 8 Porter, 352; Black & Manning v. Oliver, 1 Ala. Rep. N. S. 449.] But upon his death, without executing this contract, the property descended to his heirs at law, who were not, any more than their ancestor, bound to carry into effect this illegal condition. Nor could the legal representative of the deceased, by giving effect to an illegal contract, divest the title of the heirs at law, or defeat the rights of creditors.

To apply these principles to this case. The Court charged the jury, that unless the division of the slaves, with the assent of the defendant, among the children of Jonathan Dearman, was founded upon a valuable consideration it was void.

The objections to this charge, are, first, that it was not a charge upon the facts of the case. There was not only no evidence that a valuable consideration was given for the division of the slaves, but it is expressly shown that none was given—the charge therefore was entirely abstract.

Second—The charge supposes that if a valuable consideration had passed to the administratrix at the time of the division the title to the property would have passed. This is not the law. The statute declares that "it shall not be lawful for any executor, &c. to take the estate, or any part thereof, of any tes-

Dearman v. Dearman and Coffman.

tator or intestate, at the appraised value, or to dispose of the same at private sale, except where the same is directed by the will of the testator. But in all cases where it may be necessary to sell the whole or any part of the personal estate of any testator or intestate, it shall be the duty of the executor, &c. to apply to the Orphans' Court of their county for an order of sale, and upon obtaining the same to advertise, &c., and to sell the same at public auction to the highest bidder, giving at least six months credit," &c. [Aik. Dig. 180, §13.]

It is unnecessary to inquire into the powers of executors at common law, not only because here administration was granted on the estate, but also because the whole subject is governed and controlled by the statute. We will not inquire whether some portions of the act regulating the sale of the estates of deceased persons may not be directory merely, because here the sale, (if indeed it can be called one,) was without any order of Court directing a sale to be made, and it was made *privately*. This the statute declares *unlawful*, and certainly no right can be derived from an unlawful act. The law is thus declared in a construction given to this particular clause in *Ventriss v. Smith*, [10 Peters, 161,] and it meets our entire approbation. If then there had been an actual sale made of the slaves in question to the plaintiff by the administratrix *privately*, and a full consideration paid, the title would not have passed as against the heirs, distributees or creditors. How far such an illegal sale would be binding on the executor, we need not inquire.

It may be said that if this is an error it is one in favor of the plaintiff in error, but it is manifest from this examination, that the case was not put to the jury on its merits, but was made to depend on the existence of a fact which was not only foreign to its merits, but which was not in evidence before the jury.

The Court should have instructed the jury to inquire, first, whether there was an actual sale of the property to Solomon, without condition, and if they found such to be the fact, they must find for the defendant. Second—if there was proof of an agreement at the time of the transfer of the slaves to Solomon, to divide the negroes at his death, or upon the arrival at age of the children of Jonathan, among those children, then to

inquire, upon the principles laid down in this opinion, whether that agreement was entered into in good faith, or with intent to delay, hinder or defraud the creditors of Jonathan Dearman, and that if they found the latter to be the fact, then they must find for the defendant. But if the agreement to divide the slaves was entered into in good faith, then the defendant, as administratrix, was justified in executing the contract; and if the slaves in controversy had been delivered to the plaintiff as his share in the division, he was entitled to recover them in this action, notwithstanding they may have been left with the defendant to assist in gathering the crop.

Let the judgment be reversed and the cause remanded for another trial in conformity with this opinion.

MILLER ET AL V. McMILLAN ET AL.

1. An attachment cannot be sued out where the indebtedness of the defendant depends upon a contingency which may never happen: *aliter*, where the indebtedness is absolute, though the day of payment has not arrived.
2. An attachment issued against the estate of Charles G. Miller, William J. Wright and Thomas R. Crews; the writ was indorsed thus—"I do hereby authorize R. Thorn, as my special deputy, to execute the within attachment. 10th February, 1841. M. E. Gary, sheriff, S. C." "Levied on four bags marked T. R. C., also twenty-one bags W. J. W., also fifteen bags marked C. G. Miller, as the property of the defendants. M. E. Gary, S. S. C. by R. Thorn, D. S." Held, 1. That the Supreme Court must judicially know that Mathias E. Gary was sheriff of Sumter, and that the letters "S. C." are intended to designate that county. 2. That the appointment of the special deputy was regular; and, 3. That the return sufficiently shewed that the property levied on was the defendants.
3. Where an attachment against a non-resident debtor was continued in Court for more than six months after its return, it cannot be objected to a judgment rendered thereon, that publication of its pendency was not made.
4. It is no objection to a declaration in a suit commenced by attachment, that it charges the defendant in custody, instead of stating that his estate was attached.

Miller et al v. McMillan et al.

WRIT of Error to the Circuit Court of Sumter.

This was an action commenced by attachment, at the suit of the defendants in error, against the plaintiffs, as non-resident debtors. The affidavit declares, "that Charles G. Miller, William J. Wright and Thomas R. Crews, will, on the first day of March next, be justly indebted to him, the said McMillan, to the amount of eight hundred and fifty dollars," &c., and is dated on the 12th February, 1841. The writ of attachment pursues the affidavit, and is indorsed as follows:

"I do hereby authorize R. Thorn, as my special deputy to execute the within attachment. 10th February, 1841.

M. E. GARY, Sheriff S. C."

"Levied on 4 bags marked T. R. C., also 21 bags W. J. W., also 15 bags marked C. G. Miller, as the property of the defendants, this February 15th, 1841.

M. E. GARY, S. S. C.

By R. THORN, D. S."

The declaration is in the usual form, on a promissory note, charges the defendant in custody, &c., was filed on the return of the attachment, at March term, 1841; and a judgment was rendered at the term next succeeding, by default.

ELLIS, for the plaintiffs in error. The affidavit and attachment are insufficient, in not setting out the indebtedness charged, with more particularity as the statute requires. The levy of the attachment is defective—1. In not showing by what sheriff it was made. 2. Because the authority to the deputy was not regular. 3. Because it does not show which of the defendants property was levied on.

Again: There was no notice of publication, or order made limiting the time for the defendants to appear, &c. And the declaration is bad in charging the defendants in custody, instead of alledging their property had been attached.

He cited 3 Stewt. Rep. 326; 2 Stewt. & P. Rep. 406; 6 Porter's Rep. 455.

CRABB & COCHRAN, for the defendants, submitted the following brief of an argument:

1. The attachment laws are not to be construed rigidly, and any slight or formal defects or irregularities will be amended. [Pearsoll and Stanton v. Middlebrook, 2 St. and Por. 406.]

2. A defendant in attachment cannot, by plea in abatement, contest the truth of the facts charged as the ground of the attachment, when the affidavit and other proceedings on their face appear regular and sufficient. [Middlebrook v. Ames, 5 St. and Porter, 158.]

3. An attachment ought not to be quashed because the articles of personal property levied on are not specifically described in the sheriff's return. [Green v. Pyne, 1 Ala. Rep. 235.]

4. The return of a sheriff to a judicial attachment against three defendants, that by virtue of the writ he had levied on certain slaves, and that the same were replevied by the bond of the defendants, is conclusive to show that the slaves were the property of all the defendants. [Kirksey et al v Bates, 1 Ala. Rep. 303; Bickerstaff v. Patterson, 8 Porter, 245.]

5. Notice to defendant, or advertisement, is not necessary in a case of attachment against an absent defendant where the judgment is not rendered until after the expiration of six months from the issuance of the attachment. [Bickerstaff v. Patterson, 8 Port. Rep. 245.]

6. A possible debt, depending upon a contingency which may never happen, cannot be proceeded on by attachment. [P. and M. Bank of Mobile v. Andrews, 8 Port. 404.] But such contingency must appear of record, to be available.

7. When the suit is commenced by attachment, it is unnecessary to carry into the declaration any of the recitals contained in the bond and affidavit, as these have no connection with the cause of action. [Reynolds v. Bell, 3 Ala. Rep. 57.]

8. It is not lawful for the defendant in any original attachment to traverse or put in issue the grounds upon which the attachment issued. [Statute of 1837, Meek's Sup. 8, §5.]

COLLIER, C. J.—1. The objection taken to the affidavit and attachment, even conceding that it is now regularly made, cannot be sustained. In effect they charge that the defendants are indebted to the plaintiffs in a sum of money to be paid *in futuro*. This is permitted by the seventh section of the act of

1833, which expressly authorizes the issuance of an attachment, "although the debt or demand of the plaintiff be not due." [Aik. Dig. 39.] In this respect the case is unlike *Benson v. Campbell*, [6 Porter's Rep. 455;] there the defendant was not indebted at the time the process issued, and whether there ever would be an indebtedness, depended upon a contingency which might never happen; but here, so far as we are informed, the indebtedness is absolute, though the day of payment has not arrived. [See also the *P. and M. Bank of Mobile v. Andrews*, 8 Porter's Rep. 422.]

2. We must judicially know that the sheriff of Sumter county is named Mathias E. Gary, and knowing this, will intend that the letters "S. C." which follow his official designation, are the initials for Sumter county. This legal presumption is authorized both by analogy and precedent.

There is no statute in this State which prescribes the manner in which sheriffs shall appoint their deputies, and we cannot conceive of any valid objection to the special deputation which is shown by the record in this case. In *McGehee v. Eastis*, [3 Stewart's Rep. 307,] this question was largely considered, and the Court were of opinion that the sheriff was not restricted in the mode of appointment; even holding that the sheriff may appoint a general deputy by parol or without writing, and that such appointee may do any act of a ministerial character which his principal could.

The return of the levy is sufficiently specific. It states the number of the bales of cotton, with their marks, and affirms that they are the property of the defendants. The reasonable inference, and the legal conclusion, is, that they are the property of all the defendants in attachment. In *Bickerstoff v. Patterson*, [8 Porter's Rep. 245,] the sheriff returned that he had levied the attachment on sundry articles of property without adding that they were the defendant's; so in *Kirksey et al v. Bates*, [1 Ala. Rep. N. S. 303,] the sheriff returned that he had levied the attachment on several negroes, (naming them,) and that they were replevied by the defendant, without designating which one of them. In the first case the Court said they would intend the property levied on to belong to the defendant; in the latter that they would not look to the replevy bond, but would intend from the return, that the slaves were

the property of the *defendants*. These decisions are conclusive to show that the return in the case at bar is unexceptionable.

3 The judgment was not rendered by the Circuit Court until more than six months after the issuance of the attachment; in fact until after the expiration of that period from its return to that Court. This being the case, the publication of the pendency of the attachment, supposed to be indispensable by the counsel for the plaintiff in error, was wholly immaterial. Such was the decision of this Court in *Bickerstaff v. Patterson*, 8 Porter's Rep. 245; *Murray v. Cone et al*, id. 250.

4. The objection to the declaration that it charges that defendant is in custody, &c. instead of stating that his property was attached, &c. is too formal to have been allowed on demurrer, much less can it avail on error.

The consequence is, that the judgment is affirmed.

POWERS AND BULL v. THE STATE.

1. The act of 1829, which imposes a penalty of forty dollars on any Justice of the Peace who shall perform any official act after his removal from the beat in which he was elected, is modified by the act of 1840, as it respects Justices elected for the city of Mobile; which latter act authorizes Justices of the Peace elected within the city, to reside, hold their offices, and transact official business in any beat within the same. Consequently, a plea in abatement, which alleges that a recognizance was taken by a Justice of the Peace in the city of Mobile, after his removal from the beat for which he was elected, should negative his election in one of the beats of the city.

SAMUEL POWERS was arrested in December, 1841, for an offence against the State, and taken before John Stringer, then acting as a Justice of the Peace for Mobile county, who recognized him with the plaintiffs in error as his sureties, to appear at the term of the Circuit Court of that county, to be holden in February, 1842. At the term appointed for the appearance of

the accused, he failed to appear, and a judgment *nisi* was rendered against him and his sureties, for the sum of twenty-five hundred dollars, the penalty of the recognizance, and a *scire facias* awarded, requiring all the recognizers to show cause why the judgment should not be made absolute against them. The *sci. fa.* was served on the sureties only, who pleaded—

1. That Thomas Stringer, who took the recognizance on which they were sought to be charged, was not a Justice of the Peace, or in any manner authorized to take the same.

2. Thomas Stringer was, on the — day of —, 1841, elected a Justice of the Peace for Beat No. 3. of the 89th Regiment of the Militia of this State; that he has not resided in that Beat since his election, but has performed the duties of Justice of the Peace without the same, in the city of Mobile, where the recognizance in question was taken by him.

3. This plea alledges the election of the Justice, the exercise of his office in the city of Mobile, the taking of the recognizance there, as in the second plea, and only varies from it in alledging the removal of the Justice from the Beat in which he was elected on the day of his election.

The Solicitor filed a negative replication to the first plea and demurred to the second and third. The demurrer was sustained and a verdict being found for the State, upon the issue to the first plea, a judgment was rendered for the State. To revise which a writ of error is prosecuted to this Court.

J. GAYLE, for the plaintiffs in error. The act of January, 1829, prohibits, under a penalty, a Justice of the Peace from performing any official act, after his removal from the Beat for which he was elected. If a statute prohibits the doing of an act, and inflicts a penalty upon the offender, it is equivalent to an express declaration that the act is void. [4 Taunt. Rep. 876; Carthew's Rep. 251; Skin. Rep. 322; 1 Kent's Com. 467.]

The constitutional provision which requires that a competent number of Justices of the Peace shall be elected in each county, does not, by implication inhibit the Legislature from requiring them to be elected from different districts in the county, and when elected to reside in the district for which they are respectively chosen. While such requisitions do not limit

the official authority of the Justice to an improper extent, they are greatly promotive of convenience. If the law were otherwise, it might so happen, that instead of being distributed through the county, they might all reside in the same neighborhood.

The unfitness of the thing, or inconvenience of treating as void the act of the Justice, can have no influence upon the Court, the legislative will, if clearly expressed, must control. He cited Aik. Dig. 100, §2, 9; 299, 388, §5.

The ATTORNEY GENERAL, for the State, cited the act of February, 1840, "Authorizing Justices of the Peace in the city of Mobile, to hold their offices and transact business without the limits of their proper beats;" and insisted that it showed that the demurrer of the State to the second and third pleas of the defendant should have been sustained.

COLLIER, C. J.—The act of January, 1829, "prohibiting certain persons from exercising the powers of Justice of the Peace and Constable in this State," imposes a penalty of forty dollars upon any person elected a Justice of the Peace, who shall perform any official act after his removal from the Beat in which he was elected; and gives an action for its recovery, one half of which is to be appropriated to the use of the party aggrieved, and the other half to the poor of the county. It is needless to consider whether the imposition of a penalty by statute, is tantamount to a prohibition of the act, and whether the act done is so absolutely void, as to confer no right or impose no obligation, if the argument of the Attorney General is sustainable.

This argument we will now examine. The act of 1840, which has been cited, enacts, "That all Justices of the Peace who have been, or shall hereafter be elected, within the limits of the city of Mobile, shall, and may, be authorized to reside, hold their office, and transact official business in any Captain's Beat within the limits of said city; any law to the contrary thereof notwithstanding." Now here is a direct abrogation of the act of 1829, so far as it applied to the city of Mobile, and Justices of the Peace are authorized to reside in, and do business in

Woodward v. Harbin.

any part of the city, no matter in which one of its beats they may have been elected. Both the second and third pleas allege, that the Justice of the Peace taking the recognizance in question, was elected to that office in Beat No. 3, for the 89th Regiment of the Militia of this State. We are not informed that Beat No. 3, is not in the city of Mobile, and must rather intend that it was, in the absence of any allegation on this point, upon the principle that the pleading must be taken most strongly against the pleader. It cannot be objected that the act of 1840 is private, and should have been brought to the view of the Circuit Court. Without admitting such to be its character, it is quite enough to say, that all private statutes as printed with the general acts of the Legislature, may be used as evidence of the law. [See act of 1811, Aik. Dig. 283, §139.]

This view is decisive to show, that the pleas which were demurred to, do not sufficiently negative the want of authority in Stringer, as a Justice of the Peace to take the recognizance. The judgment of the Circuit Court is consequently affirmed.

WOODWARD v. HARBIN.

1. A sheriff may amend his return to a writ of *fiery facias* issued at the suit of an indorsee against the maker of a promissory note, so as to make it conform to the statute, although several years have elapsed, an action been commenced against the indorser, and a declaration filed, alledging that the return was such as it is made by the amendment; and the amended return will have a retrospective relation, and be evidence for the plaintiff on the trial against the indorser.
2. It will not be intended, in the absence of all proof, (even against a party demurring to evidence,) that a sheriff returned an execution placed in his hands, before the time when, by law, it was returnable.

NOTE.—This case was decided at the June term, 1841, but, being mislaid, was not published in its proper place.

3. In an action by an indorsee against an indorser, the latter need not plead in abatement that the suit was commenced before an execution against the maker was returned ; the *general issue* throws upon the plaintiff the burthen of proving that fact, and the law makes it a prerequisite to his right to recover.

THE defendant in error, as the indorsee of a promissory note made by Thomas J. Ewing, brought an action of assumpsit in the Circuit Court of Talladega, against the plaintiff, his immediate indorser.

In the declaration it is alledged that suit was brought against Ewing in the Circuit Court of Lowndes, to the term of that Court holden on the first Monday after the fourth Monday in March, in the year 1837 ; being the first Court to which suit could be brought, after the maturity of the note. That judgment was recovered at the next succeeding term, for the amount of the note, with interest and costs ; and immediately thereafter, a writ of execution was issued for the collection of the same, which, on the 20th day of October, 1837, was placed in the hands of the sheriff of Lowndes to execute and return ; and the sheriff did afterwards return the same *nulla bona*, or no property found. The declaration then alledges the liability of the defendant in the usual form.

The defendant pleaded *non assumpsit* and several other pleas, which, as no reference is made to them in the opinion of the Court, they need not be here particularly noticed. At the trial the defendant below demurred to the proof adduced on the part of the plaintiff—

First—Because it was shown by the record, that the sheriff of Lowndes returned the execution against Ewing *nulla bona*, and more than two years after the commencement of this suit, was permitted by the Circuit Court of that county to amend his return, by substituting therefor the return of “No property found.”

Second—Because the writ of execution against Ewing was returnable on the first Monday after the fourth in March, 1838, and neither the original, nor the return made *nunc pro tunc*, are dated, or were proved to have been made at an earlier day, yet the present suit was brought at least eight days before the time designated for its return.

The Court overruled the demurrer, and judgment being ren-

Woodward v. Harbin.

dered for the plaintiff, the defendant has sued a writ of error to this Court.

W. P. CHILTON and STONE, for the plaintiff in error.

MOODY, with whom was S. P. STORRS, for the defendant.

COLLIER, C. J.—By the second section of the act of 1828, “defining the liability of indorsers, and for other purposes,” as explained by the act of 1829, it is enacted, that where any contract in writing, for the payment of money, &c. save and except such as is governed by the law merchant, shall be assigned, suit thereon, shall be brought to the first Court of the county where the maker resides, to which the writ can properly be made returnable. *And further*, that when a judgment shall be recovered on any assigned or endorsed note, &c., and a writ of *fieri facias* shall be returned by the proper officer, “no property found,” the assignee or indorsee may commence his action against the assignor or indorser, on the assignment or indorsement, and the return on the *fieri facias* shall be sufficient evidence of the insolvency of the maker, &c., to authorize a recovery against him. [Aik. Dig. 330.]

It is argued for the plaintiff in error, that although, in ordinary cases, it is competent for a Sheriff to amend his return upon process, so as to make it speak the truth, and his return, when amended, may relate back to the time when it should have been made, yet the amendment in the present case cannot have a retrospective relationship, because the statute makes the return of “no property found,” a pre-requisite to the liability of the indorser. This argument cannot be maintained. Such a return is required by the statute as a means of proving the inability of the maker to pay the paper indorsed, and when made is conclusive to that point; but it is not less amendable *nunc pro tunc*, than is the return of a Sheriff to original or final process.” That the latter may be amended, even after judgment rendered and a writ of error sued out, has been repeatedly adjudged; and when thus amended, the proceedings are legalized by relation.

In order to charge special bail by *scire facias*, the law requires that a *capias ad satisfaciendum*, shall be issued on the judgment recovered against the principal and returned *non est*

inventus, yet it has been held that a sheriff who had the *ca. sa.* in his hands before the issuance of the *sci. fa.* and returned it to the proper depository, might after the latter writ had issued indorse thereon his return of *non est inventus*. Such was the decision in Mahurin v. Brackett, [5 N. H. Rep. 9.] In that case the Court say, "It has been argued on the part of the defendant in this case, that the omission to make the return of *non est inventus*, discharged the bail, because his liability depended upon such a return. But the liability of bail is founded not upon the return, but upon the breach of a contract, that the principal shall not avoid. It is true that bail cannot be charged without such a return, but this is because the statute has made a return the admissible evidence of the avoidance. The omission to make the return, then, in this case, left no defect in the essential grounds of the liability of the bail, but a defect in the proof. And we think the officer was properly permitted in the Court below, to supply this defect, by an amendment of his return." A similar decision has been made in Kentucky. [Malone, Chiles & Co. v. Samuel, 3 Marshall's Rep. 350.] There the Court say, "the amendment made, must, we think, have relation to the time when the process was returned." These cases are strikingly analogous in principle to the one at bar, and are sustained by reasoning so cogent as to relieve us from a further examination of the first point in the cause. [See also Smith v. Daniel's Executors, 3 Murphy's Rep. 128.]

Second—By a statute of this State, it is made the duty of sheriffs "to return all writs and executions to the Clerk's office from which they shall issue, at least three days previously to the term of the Court, to which they shall be returnable." [Aik. Dig. 279.] Under this act, it has been held that although a sheriff is not bound to return an execution at a day earlier than it directs, yet he may at any time after its receipt return "no property found," and that such return will be evidence for an indorsee in an action against an indorser. [Reese v. White, at last term.]

Neither the first nor amended return of the sheriff of Lowndes show on what day the execution was returned, and no extrinsic proof was adduced to this point. The evidence adduced at the trial on the part of the plaintiff was demurred to, and

the Court were authorized to make every presumption against the party demurring, which a jury could legitimately have made.

It is clear from the evidence in this cause compared with the date of the writ, that the present action was brought at least eight days previous to the term when the execution against Ewing was returnable. The natural inference from this State of fact, and the only one which it seems to us could have been fairly made by the jury, is, that the sheriff of Lowndes returned the execution at the time he was required by law to do so. Such a return would be most usual and regular, and one made on an earlier day, would have been made on the sheriffs responsibility, and might possibly subject him to damages; especially if it should appear that the defendant in execution had property in his possession between the time of such return and the regular return day.

The reasonable inference, from the want of precise proof on this point, being such as we have stated, notwithstanding the defendant admitted by his demurrer, not only the facts proved, but all fair and legitimate deductions from them, he cannot be held to have admitted a fact not proved, and which cannot be legitimately deduced from the evidence.

But it was argued for the defendant in error, that the pleas on which issues were submitted to the jury being in bar, an objection that the suit was brought before the return of the execution could not have been entertained—had the plaintiff in error desired to object, that the action was prematurely brought, he should have pleaded in abatement. To sustain this argument the case of *Jones v. Yarborough*, at this term, has been cited. That was an action of assumpsit on a promissory note, to which the defendant, among other pleas in bar, pleaded the general issue. The writ bore test a few days previous to the maturity of the note, but the declaration correctly described the note, and it was only by a reference to the writ that the objection was discovered. We held, that the defendant having pleaded in bar of the cause of action alledged in the declaration, his pleas would not allow him to defeat a recovery by shewing that the suit was brought before the cause of action accrued, that the pleas admitted the regularity of the proceedings. In the case at bar, the declaration necessarily puts in

Willard Freeman & Co. v. Womack.

issue the issuance and return of the execution against the maker of the note, before the commencement of the action. Proof of that fact was indispensable to the plaintiff's right of recovery under the state of the pleadings, which expressly negatived it. The case cited then, is unlike the present, both in its facts and the principle on which it rests, and the argument attempted to be supported by it cannot be maintained.

There being then, an entire absence of proof to show, that the execution against the maker of the note was returned before this suit was brought, or any thing in the record to warrant such a conclusion, the demurrer to the evidence should have been sustained by the Circuit Court. The consequence is, its judgment is reversed and the cause remanded.

WILLARD FREEMAN & Co. v. WOMACK.

1. Where a writ of *fiery facias* was placed in the sheriff's hands, on which with due diligence he could have made the money, after its return the defendant in execution paid the plaintiff the amount of the judgment, except costs, and a few days after such payment, made a suggestion under the statute of the sheriff's failure to collect the amount of the execution—*Held*, that as the principal and interest were paid before the suggestion was made, the plaintiff was not entitled to a judgment against the sheriff for the damages allowed by law for the want of diligence.

THIS was a suggestion in the county Court of Sumter, against the sheriff of that County, alledging that, with due diligence, the amount of an execution issued from that Court and returned by him unsatisfied, could have been made.

The cause was submitted to the Court on facts agreed by the parties. From the case agreed, it appears that on the 7th

NOTE.—This case was decided at the June term, 1841, but, being mislaid, was not published in its proper place.

Willard Freeman & Co. v. Womack.

of March 1840, a writ of *feri facias* for the sum of seventeen hundred and sixteen dollars and forty cents, besides costs, was issued from the County Court of Sumter, and placed in the hands of the defendant, as sheriff—that the *fi. fa.* was at the suit of the plaintiffs against Edward B. Colgin and Washington Dunn, and returnable on the second Monday in July next after its issuance. It was admitted that the sheriff, by the return term of the execution could, with due diligence, have made the money thereon, and that he had entirely failed to do so.

It was further admitted, that Edward B. Colgin, on the 10th February, 1841, paid the amount of the judgment on which the execution issued, with interest thereon, (but not the costs of suit,) to the plaintiffs in Mobile, who gave a receipt to the successor of the defendant, the present sheriff of Sumter; and that the suggestion in this cause was made on the 12th February, 1841.

On these facts the County Court rendered a judgment in favor of the defendant; to revise which the plaintiffs have sued a writ of error to this Court.

Boyd, for the plaintiff.

Hair, for the defendant.

COLLIER, C. J.—The only question raised on the assignment of error is this, are the plaintiffs, on proving the allegations of their suggestion, entitled to recover damages on the execution, the execution itself having been satisfied, (with the exception of the costs,) previous to the time when the suggestion was made? The solution of this question must depend upon the construction of the third section of the act of 1826, “the better to secure money in the hands of Clerks, Sheriffs and Coroners.” That section is in these words: “Whenever any sheriff or coroner to whom an execution shall have been delivered, shall fail to make the money on or before the first day of the term of the Court, to which said execution shall be returnable, and the plaintiff or plaintiffs, his, her or their attorney, shall suggest to the Court that the money could have been made by said sheriff or coroner, with due diligence, it shall be the duty of the Court, forthwith to cause an issue to

be made up to try the fact; and if it shall be found by the jury that the money could have been made by the sheriff, or coroner, with due diligence, judgment shall be rendered against said sheriff, or coroner, and his securities, or any, or either of them, for the sum of money specified in said execution, together with *ten per centum* on the amount of said execution as damages, and also the costs of the suit." [Aik. Dig. 175.]

The right to recover damages under this act, is certainly not the principal matter provided for, but it is the recovery of the amount of the execution which, for want of due diligence, the officer in whose hands it was placed has failed to collect. The damages are merely accessorial, and depend upon the right of the plaintiff to make the suggestion to the Court. The fact to be suggested to the Court, and the gravamen of the complaint is, that in consequence of the sheriff's neglect, the amount of an execution has not been made. Now it was conceded in argument, that the receipt of the money after the sheriff's default, and before the suggestion made, would prevent a judgment for the sum expressed in the execution; and we think this is clearly true.

If then the principal matter has been entirely satisfied, is it permissible to prosecute this proceeding, merely to recover that, which is incidental to, and dependent upon it? We think not. And this conclusion, apart from the general reasoning which sustains it, seems to us to acquire increased strength from the latter part of the section cited. The judgment there directed to be rendered is "for the sum specified in said execution, together with *ten per centum* on the amount," &c. In the case at bar, the statute judgment could not have been rendered at the time the suggestion was made, because the execution was previously satisfied, excepting the costs, and we think this, at least, a persuasive argument against the plaintiff's right to recover.

The failure of the defendants in execution to pay the costs before the suggestion was made, cannot place the plaintiffs in a more favorable position; for the costs are due to the officers of the Court, and the *ten per centum* damages are never calculated upon them. In fact the plaintiffs did not insist upon a judgment for the costs of the execution.

If the suggestion had been made before the money was paid

Willard Freeman & Co. v. Womack.

to the plaintiffs, we will not say that they could not have recovered the damages. But as the case is presented to us, we are satisfied that the County Court did not err, and its judgment is consequently affirmed.

GOLDTHWAITE, J.—I dissent from the foregoing opinion. I am impressed very strongly with the belief that the sheriff, in this case, is liable under the statute, and that after a default by him, the plaintiff is as much entitled to the damages as he is to the debt, and that the sheriff can only be discharged by a release, or by not pursuing the remedy within the time allowed by law.

REPORTS

OF

CASES ARGUED AND DETERMINED,

JANUARY TERM, 1843.

CAMPBELL, USE, &C. V. SPENCE ET AL.

1. The *lien* created by a judgment on lands, is co-extensive with the State, but a *bona fide* purchaser under a *feri facias*, issued on a junior judgment would be protected.
2. Where the execution is superseded by the suing out a writ of error and giving bond with surety, the *lien* of the judgment is discharged.
3. The execution of a forthcoming bond, or bond to try the right of property, does not impair the *lien* of the judgment.
4. A levy and seizure by the sheriff of goods sufficient to satisfy the execution will as it respects the defendant in execution, be a satisfaction, although the goods be wasted by the sheriff.
5. When a levy is made on property sufficient to satisfy the execution, and the plaintiff directs the sheriff to leave it with the defendant on his promise to have it forthcoming on the day of sale, and it is not so delivered, such levy will be regarded as a satisfaction of the execution as it respects junior judgment creditors.
6. A *levy and sale* under a senior execution, will be considered a satisfaction as it respects a junior execution subsequently levied on other property of the defendant, although the sheriff may make a misapplication of the money, and the plaintiff in the senior execution will be remitted to his claim against the sheriff.

ERROR to the Circuit Court of Talladega.

This was a motion by the plaintiff against the defendant, sheriff of Talladega, for failing to pay over money on an execution against one Chandler and William H. Moore.

The defendant in error having realized a sum of money by

Campbell, use, &c. v. Spence et al.

the sale of some lands of Moore, by his return on several executions, brought the money into Court, in discharge of the eldest *liens*, and this motion was made for the purpose of ascertaining that fact.

The Court rendered judgment in favor of the sheriff on an agreed case, from which it appears that the judgment of the plaintiff was obtained on the 16th November, 1841, against Chandler and Moore, for \$512 78. A *fi. fa.* issued on this judgment, and came to the hands of Griffin, the predecessor of Spence, who made no levy, but turned it over to his successor, the defendant in error, who levied the same, with sundry other executions, on lands of Moore, which, at the sale, yielded the sum of \$2,442.

At the August term, 1841, of the County Court of Madison, the Huntsville Bank recovered a judgment against the defendant, Moore, and others for \$575, and execution thereon, which was received by Griffin, and levied on two slaves, sufficient in value for its satisfaction, and returned by him not sold for want of time. An alias issued thereon, and was received by Spence, (the former levy not being indorsed thereon,) by whom it was levied on two slaves of sufficient value to satisfy the execution, but it does not appear that the slaves were sold.

At the same term of Madison County Court the Bank obtained another judgment against Moore for \$3,000 besides damages, upon which a *fi. fa.* was issued, and came to the hands of Griffin, by whom it was levied on ten negroes, the property of Moore, of sufficient value to satisfy the execution, and returned not sold for want of time. An alias issued on the judgment, without notice of the former levy, and came to the hands of Spence, by whom it was levied on certain negroes of value sufficient to satisfy the execution. The alias execution was placed in the sheriff's hands by one Jordan, the son-in-law of Moore, at whose instance the levy was made—the negroes were not present, and by the direction of Jordan were left in Moore's possession, on the promise of Jordan to have them forthcoming on the day of sale. The slaves never came to the sheriff's hands, and were not produced at the day of sale. The indorsement of the levy was afterwards erased by Spence.

Campbell, use, &c. v. Spence et al.

On the 12th May, 1841, B. Bradford obtained a judgment in Talladega Circuit Court, against Moore, for \$6,679 92; a *fi. fa.* issued thereon, and was delivered to the sheriff, Griffin, but before the return day thereof was superseded, Moore suing out a writ and executing bond with surety to obtain a writ of error to the January term, 1842, of the Supreme Court, at which term the judgment was affirmed; a *fi. fa.* was issued thereon and placed in the hands of Griffin, by whom it was handed over to Spence, his successor, and by him levied on the same lands on which the plaintiff's execution was levied.

The Branch Bank of Montgomery obtained two judgments at the November term of the Montgomery Circuit Court, one on the 22d for \$139, and the other on the 27th November, for \$475, upon which executions were issued and came to Griffin's hands, who turned them over to Spence, by whom they were levied on the lands of Moore.

The State Bank recovered a judgment against Moore and others, on the 4th February, 1840, for \$919 66. Three successive writs of *fi. fa.* issued thereon, and came to Griffin's hands, who levied the last on four slaves, and returned that three of the slaves were claimed by a third person, and bond given to try the title, but the claim bond was never returned. A fourth *fi. fa.* was received by Spence and levied on the land above mentioned.

The Branch Bank at Mobile recovered a judgment against Moore in the County Court of Mobile, on the 6th December, 1841. A *fi. fa.* issued thereon, came to the hands of Spence, and was levied on the same land.

On the 20th January, 1842, one Anderson recovered a judgment against Moore and others, for \$80 52, on which a *fi. fa.* issued, and came to the hands of Spence.

At the time Spence came into office, there were sundry writs of *fi. fa.* in the hands of Griffin, which were levied before the expiration of his term of service, and therefore not turned over to his successor, Spence, amounting in all to about the sum of \$29,000, on which he had sold property to an amount exceeding the sum of \$24,000. The executions thus in his hands, on judgments older than that of the plaintiff, amounted to the sum of \$23,888, the residue was the amount due on judgments junior to that of the plaintiff. In making the application of the

sum above mentioned of \$24,000, the sheriff, Griffin, did not regard the date of the judgments, but satisfied executions which issued on judgments rendered subsequent to that of the plaintiff, leaving unsatisfied two which were issued on judgments older than that of the plaintiff, viz:

One in favor of Nicholas M. Marks, for \$4,997, which was affirmed in the Supreme Court, at the June term, 1841—and one in favor of the Branch Bank at Mobile, rendered on the 28th June, 1841, for \$2,476 60. It also appears that Griffin has in his hands ten or eleven slaves levied on by virtue of these executions.

Upon these facts the Court overruled the motion of the plaintiff for judgment, and gave judgment in favor of the sheriff—from which this writ of error is prosecuted. The error assigned is, that the Court erred in rendering judgment for the defendant upon the facts agreed.

MORRIS and PRYOR, for plaintiff in error.

The judgment of the Bank at Huntsville, obtained in 1841, will not conflict with the right of the plaintiff in error to the money, because a levy was made on property sufficient to satisfy the judgment, and will be a satisfaction as against the present plaintiff. [4 Cowen, 417; 1 Brock. 166.]

The same remarks apply to the judgment for \$3,000 in favor of the Bank, and in addition, as the property levied on was sufficient to satisfy the execution and was left in possession of the defendant by direction of the plaintiff, it is evidence of fraud, and will operate a full satisfaction of the execution.

The judgment of Bradford had lost its lien by the writ of error sued out to the Supreme Court, and supersedeas of the execution, or, at least, was suspended, and the liens of other judgments created in the interim, will have the preference. The condition of the writ of error bond, which is, *to pay and satisfy such judgment* as may be rendered in the appellate Court, shows that the judgment of the inferior is merged in the judgment of the appellate Court, as there cannot be two judgments for the same thing. [1 Brock. 166; 13 Johns. 533; 5 Wendell, 58; 3 Porter, 138; 4 Stew. and Por. 268.]

The lien of a judgment on lands is not absolute, but requires the levy of an execution to make it so. Thus, if two judg-

Campbell, use, &c. v. Spence et al.

ments be rendered on the same day, neither has the preferable lien; but if one judgment creditor take out execution and sell the land, a priority is gained by the vigilant creditor. [11 Johns. 228.]

The declaration made by Spence on the day of sale, cannot affect the liens on lands as they are fixed by law.

The executions in Griffin's hands, which were levied when he went out of office, amounted to about \$29,000, on which he had sold property to the amount of about \$24,000. Amongst these was the execution in favor of Marks. This judgment the Court must consider satisfied, because Griffin had abundant time to make the money. The Court will presume that the negroes levied on were sufficient to satisfy this execution, because it is not shown that they were insufficient, and because also, this Court must presume that Moore had sufficient personal property to satisfy this execution.

The judgment in favor of the Bank at Mobile, for \$2,476, will be presumed to have been satisfied by a part of the \$24,000 collected by Griffin, as the judgments which were older than the present plaintiff's amounted to only \$23,888, and the residue of the sum of \$2900 was composed of junior judgments. But it does not appear that the executions composing this sum issued on judgments obtained in Talladega county, or if elsewhere, that they were levied on this land before the plaintiff's, which must have been the case to entitle them to a preference over it.

The sheriff, Griffin, seems to have applied the money in his hands without regard to the rights of the parties. When he does this, he takes upon himself the satisfaction of all the executions in his hands, and this Court will presume that the ten or eleven negroes in his hands are of value sufficient to satisfy all the executions.

CHILTON, contra. Before Griffin went out of office he levied on the same land sold by Spence, his successor. If the levy authorizes him to sell, and avoid the sale made by Spence, his successor, then the purchase money obtained by Spence ought to go back to the purchaser. [5 Dana, 578.]

A lien on land means nothing more than the right which the party holding it has for the satisfaction of his demand out of

Campbell, use, &c. v. Spence et al.

the land. The judgment does not divest the defendant of his title, nor does the levy. It is the sale and sheriff's deed which operates a divestiture of title. If then no right or title vests in the judgment creditor by virtue of the judgment, nor in the sheriff by virtue of his levy, how can Griffin, having no interest in the land, convey any title when his office has expired. The case is clearly distinguishable from a levy on personal property, by which the sheriff acquires a right to the chattel. He is not only authorized, but required to divest himself of it for the satisfaction of the demand.

There can be but one constitutional sheriff in each county. The sale of land and investiture of title by him, is an official act, and attaches to the office, not to the man. If, then, the office is transferred, does not the right immediately devolve upon the successor, and does not the security of the rights of parties require that ministerial acts of this character should be performed by sworn officers?

If the previous levy of Griffin avoids Spence's sale, then, as Spence prays the Court for aid in the proper appropriation of the funds, it would be competent for the Court to order a return of the money. A Court of Chancery would undoubtedly exercise this power, and no objection is perceived to its exercise by a Court of law.

The true doctrine appears to be that held in New York—that where land is sold under a junior judgment, the sale is good, but the proceeds go to the extinguishment of the oldest lien. [16 Johns. 287.]

ORMOND, J.—The decision of this case depends on the ascertainment of certain principles which may be thus stated: First—What is the extent of the lien created on lands by the rendition of a judgment?

In the case of *Morris v. Hill*, [3 Ala. Rep. 560,] we held that a judgment created a lien on real estate, but it was not then necessary to determine its extent, as the lands were situated in the county where the judgment was rendered. The conclusion there attained was derived from the intention of the Legislature, manifested in the different statutes, by which lands had been subjected to the discharge of judgments, and we can perceive no reason for confining the *lien*, which by operation

Campbell, use, &c. v. Spence et al.

of law, is consequent upon the judgment, to the county in which the judgment is rendered.

In the case of judgments rendered by this Court, it would scarcely be questioned that the *lien* created thereby was co-extensive with the State. Yet we can perceive no reason why that effect should be accorded to these judgments which does not apply with equal force to the judgments of any other Court of record. In either case the *lien* and its extent must depend on the statute subjecting lands to the payment of judgments, by sale under execution, and the previous enactment on the same subject, giving the writ of *elegit*. As the lands of a judgment debtor, situate in any part of the State, may be sold to satisfy a judgment rendered in any county of the State, by the process of the Court rendering the judgment, that must be the extent of the *lien*.

The argument drawn from the inconvenience of a contrary doctrine, is quite persuasive of the view here taken. The *liens* created by the judgments of the United States Courts, must at least be as extensive as the jurisdiction of these Courts, and it would be inconsistent, if not absurd, that a judgment rendered in favor of a foreigner should operate more extensively and beneficially than one in favor of our own citizens.

The most plausible argument against this extension of the *lien* is the supposed necessity thereby cast on a purchaser of examining all the clerks' offices in the State, before he can purchase with safety. The answer to this objection is, that a purchaser from a defendant in execution may always protect himself by his covenants with the vendor, and a *bona fide* purchaser under a *feri facias* upon a junior judgment, would be protected. In the language of the Court in the case of *Den v. Hill*, [1 Haywood, 72,] "were the law not so, it would be the most dangerous thing in the world to purchase land at an execution sale. Dormant judgments might be revived a long time afterwards, and the innocent vendee evicted without the possibility of ever regaining the purchase money." In such a case the *lien* of the elder judgment would be lost by the laches of the plaintiff.

Second—What effect upon the *lien* of the judgment has the superseding the execution by suing out a writ of error and giving bond with surety?

Campbell, use, &c. v. Spence et al.

In the case of *McRae and Augustin v. McLean*, [3 Porter, 138,] it is assumed as a settled principle, that a writ of error and supersedeas discharges the *lien* of the judgment, and such after a deliberate examination is our opinion.

In the case of *Wiswall v. Munroe*, at the last term, we held, that where the judgment had been superseded on error to this Court, that the judgment of the inferior Court was merged in the judgment of this Court. It follows that the *lien* of the first judgment is lost, as that could not continue after the judgment on which it was founded had ceased to exist. Nor could any execution issue in such a case upon the first judgment. But where the right to issue execution is merely suspended, as in the case of forthcoming bonds, and bonds to try the right of property, no such consequences follow, and the *lien* of the judgment will continue. See the case of *Land v. Hopkins*, at the last term, in which it was held, that the right to give a delivery bond was a mere power to delay the collection of the debt, and was for the benefit of the defendant, and that after a forfeiture of the bond, the plaintiff may still sue out execution on the judgment if he elects to do so.

Third—What will amount to a satisfaction of an execution?

One of the judgments, supposed to have a *prior lien* to that of the plaintiff in error, was obtained by the Bank at Huntsville for \$575 debt, and \$9 22 damages. This judgment was prior in point of time to that of the plaintiff; an execution issued thereon, came to the hands of the former sheriff, Griffin, who levied it on two negroes sufficient in value to satisfy the execution, which he returned "not time to sell." An *alias fi. fa.* issued on the judgment, without any indorsement of the former levy, and came to the hands of a deputy of the new sheriff, (Spence,) by whom it was levied on two slaves of value sufficient to satisfy the execution, and was returned with the levy indorsed, and that he had appointed the first Monday in May for the sale.

There can be no doubt that a levy and seizure by the sheriff of property sufficient to satisfy the execution, will be a discharge to the defendant, though the goods be wasted by the sheriff. It is, however, said that this plea is personal to the defendant, whose goods are taken, and cannot be made by a co-defendant, because it is not an actual satisfaction. [*Dyke v.*

Campbell, use, &c. v. Spence et al.

Mercer, 2 Shower's Rep. 394.] It does not appear that the slaves levied on have been sold, or that there has been a satisfaction in point of fact of the execution, although in law it must be so regarded, as it respects the defendant in execution, if the property has been actually seized by the sheriff. And although the Bank, (plaintiff in execution,) would have an undoubted right to hold the sheriff responsible on his levy, we cannot perceive on what principle the plaintiff in error could insist on its foregoing its *lien* on the land, and resorting to an action against the sheriff. From the case as stated on the record, we are of opinion that the judgment of the Bank has the superior *lien*.

The judgment, however, of the Bank, obtained at the same term of the Court, for \$3,000, does not stand in the same predicament. In that case, as in the preceding, the *fi. fa.* came to the hands of Griffin, and was by him levied on a number of slaves, sufficient to pay the debt, and was also returned "not time to sell." An *alias* issued on the judgment, without any notice of the former levy, and was placed in the hands of Spence, by whom it was indorsed levied on a number of slaves of sufficient value to satisfy it, and that the first Monday in May was appointed for their sale. This levy was indorsed at the instance of one Jordan, who had purchased and obtained an assignment of the judgment, by whose directions the slaves were permitted to remain in the possession of Moore, the defendant, and who engaged to deliver them on the day appointed for the sale. The negroes were not present when the levy was made, and were not delivered, or ever came to the sheriff's hands.

It is not necessary now to consider what acts on the part of a plaintiff in execution, in giving delay and authorizing the defendant to retain property levied on, will render the execution *dormant*, and give a preference to executions issued on junior judgments, and levied on the same property. That such delay when unreasonable, will subject the property to sale under junior executions, appears to be well settled. In the case of Russell v. Gibbs, [5 Conn. 390,] the law was thus ruled, after an examination of all the New York and many English authorities. [See also Benjamin v. Smith, 4 Wendell, 332.]

In this case, a levy was made on property sufficient to satisfy the execution—it is left in the possession of the defendant

Campbell, use, &c. v. Spence et al.

in execution, the father-in-law of the assignee of the judgment, on his promise to have it forthcoming on the day appointed for the sale, it is not produced or delivered, and must be regarded, as it respects other judgment creditors, a satisfaction. If the conduct of Jordan is not absolutely fraudulent, its direct tendency is to aid the defendant in the commission of a fraud upon a portion of his creditors, and he must abide the consequences of his own act.

It appears further that Griffin, the former sheriff, had, when his term expired, executions in his hands to the amount of \$29,000, by virtue of which he had levied and sold property to the amount of \$24,000, and that the executions in his hands on judgments older in date than that of the plaintiff in error, amounted to something less than \$24,000—the residue being the amount due on judgments subsequent to that of the plaintiff. That Griffin, in applying this money to the satisfaction of the executions in his hands, did not regard the date of the judgments, leaving two executions unsatisfied which were older in date than that of the plaintiff in error; one in favor of N. M. Marks, for about \$5,000, and one in favor of the Branch Bank at Mobile, for \$2,476. These two executions had been levied on the land sold by Spence, and on some slaves which Griffin had in his hands remaining unsold.

From this statement it appears a levy and sale was made under these executions, sufficient for their satisfaction, and in a contest with junior judgment creditors, who have acquired a *lien* on other property, it must be regarded as a satisfaction. To hold otherwise would be to permit the sheriff virtually to destroy the *lien* created by the law in favor of the judgment of the plaintiff in error, and to prefer those judgments younger than his, which were capriciously discharged by him, out of the money belonging to Marks and the Branch Bank at Mobile. It was their duty to attend to the application of the money obtained by a sale under their executions, and by neglecting to do so, they will be remitted to their claim against the sheriff, and will not be permitted to interfere with the *lien* of a junior judgment creditor subsequently obtained. As the *seizure* of property by the sheriff sufficient to discharge the debt, will be a satisfaction as it regards the defendant in execution, though the property be wasted by the sheriff, so will a *levy*

and sale under a senior execution, be considered a satisfaction as it respects a junior execution, subsequently levied on other property of the defendant, although the sheriff may make a misapplication of, or waste the money.

This principle was, in effect, held at the last term, in the case of *Smith v. Hogan*, which was a motion suggesting that Smith, the sheriff, could have made the money on an execution of Hogan, by due diligence. The defence was, that the sheriff had levied executions having a *prior lien* to that of Hogan, on all the property of the defendant which was not more than sufficient in value to satisfy them—and this Court held that a sufficient answer to the motion.

The sheriff has a right, and it is his duty, when he entertains a reasonable doubt as to the proper return to make, and when a return either of *nulla bona*, or *satisfaction*, might subject him to an action, to suggest his doubt to the Court, which will enlarge the time for making his return, until the right can be ascertained, or he is sufficiently indemnified by one of the parties. See the authorities collected on this subject in *Watson on Sheriffs*, 196.

This the sheriff, Spence, has in effect, done in this case, and the case agreed on by the parties, enabled the Court to ascertain the priorities of the several executions.

From what has been adduced in the preceding part of this opinion, it follows that in a contest between rival executions for the proceeds of the sale of lands, if the *lien* is not lost in some of the modes here pointed out, the date of the respective judgments will determine the priority of right; and the question will not be affected by the fact merely, that some of the executions remained in the hands of a former sheriff.

By the application of this rule, in connection with the other principles stated in this opinion, it follows, that of the eight judgments first described in the agreed case, but two have a prior right to the money to that of the plaintiff in error. These are the judgments obtained by the Bank at Huntsville, in August, 1841, for \$584 22, and the one in favor of the State Bank, at Tuscaloosa, of February, 1840, for \$919 66. It has also been shown that the two executions on judgments older than that of the plaintiff, in the former sheriff's hands in favor of

Allen v. Manasse and Moseley.

Marks and of the Branch Bank at Mobile, must, as it respects the plaintiff in error, be considered satisfied.

This leaves of the proceeds of the land sold by Spence, a surplus sufficient to satisfy the judgment of the plaintiff in error, and the Court below erred in not making that appropriation of the money.

The judgment of the Court below must therefore be reversed and here rendered for the amount of the judgment of the plaintiff in error.

ALLEN v. MANASSE & MOSELY.

1. The statute which exempts certain property from execution for the benefit of every family in this State, does not cover the property of one who has a family in another State, although he is here accompanied by a son, not shown to be dependent upon him.

WRIT of Error to the County Court of Sumter.

Judgment was rendered for the defendant upon an agreed case, which declares this state of facts: The plaintiff, Allen, was a house-wright and carpenter by trade, and had pursued this business for a number of years next before the attachment hereinafter mentioned, and had no other calling or avocation. For some three or more years next before the attachment he had pursued his trade in this State, having a wife and one or more children then residing in the State of Connecticut, where he also had his actual residence before coming into this State. He had one son with him, who came of age a short time before the levy of the attachment. The tools, for the taking of which the action was brought, were the plaintiff's necessary tools of trade, and the books, for taking which also, the suit was brought, were purchased by him after his marriage, when he had a family and before he come into this State, but not for

Allen v. Manasse and Moseley.

sale or merchandize. He had them packed up and was on his way with them to his wife and children, in the State of Connecticut, when the defendant, Mosely, caused them to be levied on by the defendant Mannasee, who was the sheriff's deputy, by virtue of an attachment at the suit of Barrett & Co. of which firm Mosely was a partner.

The error assigned is, that the Court erred in not giving judgment in favor of the plaintiff.

BLISS, for the plaintiff in error, argued that the statutes exempting certain effects from levy under execution are beneficial in their influence, and ought to be liberally construed. He cited, *Hall v. Perry*, 11 Wend. 44; *Wentworth v. Young*, 17 Maine, 70; *Leavitt v. Metcalf*, 2 Vermont, 342; *Freeman v. Carpenter*, 10 id. 433; *Haskell v. Candress*, 4 id. 609; *Woodward v. Waring*, 18 John. 400.]

METCALF, contra, insisted the plaintiff was not within the meaning of the statutes, being a mere sojourner while he remained here, and on the eve of departing from the State. The statute was intended to confer benefits on our own citizens, and not to protect debtors having no families resident in the State. The domicil of the plaintiff was in the State where his wife and children resided.

GOLDTHWAITE, J.—Our act of Assembly directs that certain articles shall be retained by, and for the use of every family in the State, free and exempt from levy or sale, by virtue of any execution or other legal process. [Digest, 167, §42.]

It is not disputed that the articles seized are of those enumerated in the statute, but we think the plaintiff is not one of the class of persons within its protection. The exemption is not conferred upon the property of every person, and it seems clear that a debtor, merely as such, is not considered; it is only when connected with others that protection is cast around his property, and this is, that those dependent on him may not be injured by his destitution. This connection too, which creates the exemption, must exist in this State. Such indeed, are the very terms of the enactment, but without them, it would

Allen v. Allen's Adm'r.

be difficult to conceive any sound reason for extending our own legislation beyond our own limits. The fact that the plaintiff has been accompanied by his son during his residence within the State, does not constitute them a family, within the sense of the statute. To constitute such a family there must be a condition of dependence, and no mere aggregation of individuals will create this relation. Nor can the circumstance that a family exists elsewhere, have any material influence on the case. They are possibly dependent upon the plaintiff but they are not a family within this State, and therefore are not within the letter or the spirit of the act.

To exempt this property from execution, under the circumstances disclosed, would produce no benefit to any one within the State, alone exempting the debtor, and we have already shown that, as such, the statute gives him no right.

The judgment must be affirmed.

ALLEN v. ALLEN'S ADM'R.

1. The widow of an intestate is entitled to dower in the lands of which her husband died seized, notwithstanding the administrator may have reported his estate insolvent.

WRIT of Error to the Orphans' Court of St. Clair.

W. B. MARTIN, for the plaintiff in error.

No counsel appeared for the defendant.

COLLIER, C. J.—The plaintiff in error, as the widow of John R. Allen, deceased, filed her petition in the Orphans' Court of St. Clair, praying that she might be endowed of certain real estate particularly described, of which her husband was seized of an inheritable estate during his life. After the

petition was filed, the administrator reported the estate insolvent; and thereupon the Court dismissed the petition upon the ground that the widow was not dowable of her husband's estate to the prejudice of creditors.

The object of dower is to afford sustenance to the widow, and to aid in the nurture and education of her children, if any—and the right attaches upon the land immediately upon the marriage, or as soon thereafter as the husband becomes seized—and is incapable of being discharged by the husband, without her concurrence. This estate arises solely by operation of law, and not by force of any contract, express or implied between the parties; it is the silent effect of the relation entered into by them; not as in itself incidental to that relation, or as implied by the marriage contract, but merely as that contract calls into operation the positive institution of the municipal law. [Park on Dower, 5.] The right of the wife does not depend upon the assent of the husband, except so far as that is manifested in the contract of marriage, but is independent of, and paramount to his volition. This being the case, he can make no disposition of his realty, to take effect during his life, or at his death, which will divest her right of dower; unless she has made a relinquishment in the manner prescribed by law. And it will not be allowable, where the husband dies intestate, to appropriate the land of which he was seized to the payment of the debts, if the wife would be thereby defeated of her dower. So greatly is the right of the widow favored in law, that it has been held, where the vendor of land having a lien for the purchase money, obtains a judgment against the administrators of the vendee, and sells the land, the lien does not pass to the purchaser to enable him to bar the dower of the widow of the vendee. [McArthur v. Porter et al, 1 Ohio, Rep. 44.]

But it is unnecessary to consider at greater length, the rights of the widow at common law; for the seventeenth section of the act of 1806, enacts, that whenever the real and personal estate shall not be sufficient to pay the just debts of the testator or intestate, the widow shall be endowed with one third "of the lands, tenements and hereditaments of her deceased husband." Here it is conclusively shown that the report of

Smith v. The Alabama Life Insurance and Trust Co.

insolvency should not have caused the dismissal of the petition for dower, as its effect was not to create a bar; and the order for that purpose is consequently reversed, and the cause remanded.

SMITH v. THE ALABAMA LIFE INSURANCE AND TRUST COMPANY.

1. A company was incorporated with a capital of one million of dollars, to be paid in, in cash, and such other money as it might receive in trust, one half of which capital of one million, it was required to invest in bonds or notes secured by mortgage on land within the State of Alabama, and the remaining half of the capital stock, together with the premiums and profits received by the company and the monies received in trust, might, in the discretion of the company, be invested in stocks—loaned to any city, county, or company—or be invested in such *real or personal securities*, as it might deem proper—Held, that the company could not lend its *credit*, by making bonds to fall due in future, and exchange such bonds for the bonds of an individual for the same amount; and that the bond so taken was void.

ERROR to the Chancery Court at Camden.

This bill was filed by the defendant in error to foreclose a mortgage executed on real estate, to secure the payment of seven thousand five hundred dollars, secured by a bond for that amount, with the following condition:

The condition of the said obligation is such, that whereas, the said Archibald K. Smith, is indebted to the Alabama Life Insurance and Trust Company in the said sum of seven thousand five hundred dollars, which sum is intended to be secured by this bond and mortgage.

Now if the said Archibald K. Smith shall pay, or cause to be paid, the said sum of seven thousand five hundred dollars, in manner and form following, that is to say: one fifth part thereof amounting to fifteen hundred dollars, on or before the

Smith v. The Alabama Life Insurance and Trust Co.

9th April, 1845, and one fifth part, being a like sum as the above, on or before the 9th day of April, in each and every year until the whole shall be paid, and shall, on the first day of June, and the first day of December, in the year 1839, and on the first day of June and December, in each and every year thereafter, until the above principal sum shall be fully paid, pay interest at the rate of eight per cent. per annum on whatever portion of the aforesaid principal sum of seven thousand five hundred dollars may be unpaid, so that the said Archibald K. Smith shall always pay the interest on the sum secured and unpaid semi-annually, at the office of the Alabama Life Insurance and Trust Company aforesaid, in the city of Mobile. The same to be paid, both principal and interest, at the current rate of exchange between Mobile and New York, as the same may be due at the several dates at which the aforesaid principal and interest will be due and payable. And if default be made in the payment of the said sums of money, or the interest thereof, or any part thereof, at the times hereinbefore specified for payment thereof, for thirty days, the said Archibald K. Smith, in such case, doth hereby agree that the aforesaid principal sum shall become immediately thereafter due and payable. But if the said interest and instalments be punctually paid, &c. &c.

The bill alleges that neither the instalments of the debt, or the interest thereon, or either of them, have been paid, whereby the whole bond has become due, &c.

The defendant, by his answer, admits the execution of the bond and mortgage, and that he has not paid but the first instalment of interest and exchange—that although the bond and mortgage express an indebtedness in money, that the consideration of the bond was not a debt or money, but the obligations of the Company to the amount of seven thousand five hundred dollars of the following form :

“The Alabama Life Insurance and Trust Company acknowledge to owe ———, as Secretary of said Company, for value received, five hundred dollars, to be paid to him, or to his order, at ———, in the city of New York, on the ——— day of ———, 18—; and the said Company do further engage to pay interest thereon, at the rate of six per cent per annum, semi-annually at ——— aforesaid, to-wit: fifteen hun-

Smith v. The Alabama Life Insurance and Trust Co.

dred dollars on the first days of January and July in each and every year, upon the delivery of coupons, severally hereto annexed, until payment of the said principal sum

JAMES INNERARITY, President.

E. MARTINEAU, Secretary.

That when he executed his bond to the company, he received from them the bonds of the company to the same amount, indorsed by their Secretary, and that it was in fact an exchange of credits, and insists that the company had no power under their charter to issue bonds of this character, and that his obligation to the company, given in exchange for them, is void.

By the testimony of Robert G. Gordon, it is proved that the consideration of the bond of Smith, was as stated in his answer the bonds of the company; that he was not indebted to the company, and received from them no money; that he was present and saw Smith pay one instalment of interest and exchange; that exchange on New York, ever since 1828, has been against Mobile, varying on specie funds from one-half of one per cent. to two and a half per cent.

The Chancellor decreed that the contract was valid, and that if not paid within thirty days, the mortgage be foreclosed, &c.

From this decree the defendant prosecutes this writ of error and assigns for error—1. That the bill should have been dismissed. 2. That the contract was usurious, and the principal sum only should have been recovered without interest.

DARGAN, for plaintiff in error, cited Angell and Ames on Cor. 139; 13 Peters, 587; 4 Wheaton, 636; 15 Johns. 44; 4 Randolph, 406; 4 Peters. 205, 224.

R. SAFFOLD and STEWART, contra, cited 2 Cowen. 664; 3 id. 684; 5 id. 590; 7 id. 540; 3 Wendell, 94; 9 id. 384; 15 Johns. 44; 5 Ohio Rep. 205; 7 Mass. 433; 12 S. & R. 306; 1 Ala. Rep. 148; 2 id. 452; Ang and Ames on Cor. 138.

ORMOND, J. This controversy grew out of a contract made by the Alabama Life Insurance and Trust Company with the plaintiff in error. The company advanced to the plaintiff their bonds in amounts of five hundred and a thousand dollars, in all amounting to the sum of seven thousand five

hundred dollars, which were made payable to the Secretary of the Company, or his order, at ——— in the city of New York, carrying interest at the rate of six per cent. per annum, payable semi-annually, on the first day of January and July in each and every year, upon the delivery of *coupons* severally annexed thereto until payment of the principal sum.

In consideration of the receipt of these bonds, the plaintiff executed to the Company his bond in the sum of seven thousand five hundred dollars, with condition to pay that sum in the following manner: One fifth part on the 9th April, 1845, and the remaining four-fifths annually on the 9th April of each succeeding year, until the whole sum was paid. And also agreed, on the first day of June and December, in each and every year thereafter, until the whole principal was paid, to pay interest at the rate of eight per cent. per annum, on whatever portion of the principal sum was unpaid, at the office of the Company in Mobile; both principal and interest to be paid at the current rate of exchange between Mobile and New York. Upon default of payment of either of the instalments, or interest, for thirty days, the whole principal sum to become due and payable.

To secure the performance of this contract, a mortgage was given on real estate, and default being made this bill is filed to foreclose the mortgage.

The counsel for the plaintiff in error contend, first, that this contract was usurious—secondly, that it was a sale of the credit of the Company, and being unauthorized by the charter, is void. We will examine the last point first.

It is too well settled to be now controverted that a corporation created by statute can do those acts and exercise those powers only which are conferred on it by its charter, or which are necessary to enable it to perform its functions, and fulfil the purpose of its creation—or which flow by necessary implication from some power granted. [Dartmouth College v. Woodward, 4 Wheaton, 513; Head v. The Providence Insurance Company, 2 Cranch, 127; Beatty v. Knowler, 4 Peters, 152; New York Fire Insurance Co. v. Sturges, 2 Cowen, 664; The State v. Stebbins, 1 Stew. 299.] To the act of incorporation we must therefore look for authority to make the contract here sought to be enforced.

The second section of the charter thus defines the powers of the Company :

“The said Company shall have power—1. To make insurance on lives, and also against losses by fire, and to take marine risks. 2. To grant and purchase annuities. 3. To make any other contracts involving the interest or use of money and the duration of life. 4. To receive monies in trust and to accumulate the same at such rate of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed on. 5. To accept and execute all such trusts of every description as may be committed to them, by any person or persons whatsoever, or may be transferred to them by any Court of record whatever. 6. To receive and hold lands under grants, with such general or special trusts or covenants, so far as the same may be taken in payment of their debts, or as security for loans of their capital, or otherwise, or purchased upon sales made under any law of this State, so far as the same may be necessary to protect the rights of said Company, and the same again to sell, convey and dispose of.”

The seventh section declares—“That the capital stock of the said corporation shall be one million of dollars, which shall be divided into shares of one hundred dollars each. The whole of said capital stock shall be invested in bonds or notes, drawing interest, not exceeding seven per cent. per annum, secured by unincumbered real estate, in Alabama, of at least double the value in each case, of the sum so secured: *Provided*, That houses and other buildings on town lots mortgaged to said Company, shall be insured against the risk of fire, and the policy of insurance transferred to said corporation.”

“Sec. 14. Each subscriber shall, at the time of subscription, pay the sum of two dollars on each share by him subscribed; and after the shares shall have been subscribed, each stockholder shall pay an instalment of twenty-five dollars, on each share so held by him, at the expiration of six months, at such place or places as the trustees shall appoint, of which time and place, or places, at least eight weeks public notice shall be given, and at the expiration of eighteen months after the said stock shall have been subscribed, the whole amount shall be paid, in manner aforesaid, of which the same notice shall be given. The shares of every stockholder omitting to make such

payment shall be forfeited, together with all previous payments made thereon, and the books shall be again opened as directed in the eleventh section, for subscription, and so from time to time till all shares are subscribed and paid for.

“Sec. 18. The trustees shall have discretionary power of investing the premium and profits received by the Company, and the monies received by them in trust, in government or public stock of the United States, or of any State, or in the stock of any incorporated city, or in such real or personal securities as they may deem proper, or loan the same to any county, city, incorporated town or company, at a rate of interest not exceeding the present legal rate.

The act of incorporation was amended in December, 1836, by declaring that so much of the seventh section as requires the whole amount of the capital stock of the said Company to be loaned on notes or bonds, secured by unincumbered real estate, be and the same is hereby altered and amended so as to authorize the said Company to invest and employ one half of the capital stock aforesaid in the same manner that they are authorized by the eighteenth section of the charter, to invest and employ the profits and premiums of said Company, and the monies received of them in trust, and also to take risks against the dangers of inland navigation.

A brief synopsis of this charter, as it affects this case, with its amendment is, that the capital stock of the Company was to be one million of dollars, which was required to be paid in, *in cash*—and such other monies as it might receive in trust. One half of the capital of one million it was required to invest in bonds or notes, at an interest not exceeding seven per cent. secured by unincumbered real estate within the State of Alabama—the remaining half of the capital stock, together with the premiums and profits received by the Company, and the monies received in trust, might, in the discretion of the Company be invested in stocks; loaned to any city, county or company; or be invested in such *real or personal securities* as it might deem proper, at any rate of interest not exceeding the then legal rate.

The consideration of the bond and mortgage, as recited in the bill, is, that the plaintiff in error was indebted to the com-

pany in the sum for which the bond was given. The answer denies any indebtedness and alleges that the consideration of the bond and mortgage, was the bonds of the company for the same amount, falling due subsequently; and this allegation of the answer is sustained by the proof. The contract then entered into between the parties, was a loan or exchange of the bonds of the company, for the bond and mortgage of the plaintiff in error; and we now proceed to inquire what provision of the charter authorized the company to make such a contract.

By the second clause of the second section of the charter, the company are authorized "to grant and purchase annuities," and by the third, "to make any other contracts involving the interests or use of money, and the duration of life."

We do not consider it necessary at this time to inquire whether these two clauses have not a necessary connection, and whether the "contracts involving the interests or use of money," which the company are empowered to make, are not connected with *annuities and insurance on lives*, because so far as these clauses can be understood to authorize a loan or investment of the funds of the company, they are illustrated and explained by other portions of the charter, where the power of loan or investment of the capital stock, is applied to the particular cases in which these powers may be exercised; as in the third, fourth, fifth and sixth, and especially in the seventh and eighteenth sections, and in the amendment to the charter. But if the third clause, before referred to, could be considered, contrary to the whole scope and design of the charter, as a substantive grant of power to the company, to make any contract "involving the interests or use of money," not to be controlled, or regulated, by other parts of the charter clearly hostile to such an interpretation, it would not avail the company to sanction the contract made in this case, unless it can be shown that by the use of the term *money*, the Legislature meant the *promises* of the company to pay money in future, or that *credit* could be considered as synonymous with *cash*.

By the charter, as originally framed, the company were required to invest its entire capital of one million of dollars, in bonds or notes, drawing an interest not exceeding seven per cent. per annum, secured by unincumbered real estate within

the State of Alabama, which was so far modified by the amendment to the charter, as to require but one half of the capital stock to be thus invested. It cannot be pretended, that the investment in this instance was made out of that portion of the capital stock required to be invested by mortgage on land in Alabama, because the obligation of the company to pay money in future, cannot be considered a part of the capital stock which was required to be paid in in cash, and also because this contract is at the rate of *eight* per cent. per annum, whilst these investments were, by the charter, required to be at a rate not exceeding *seven* per cent. per annum.

By the eighteenth section and the amendment to the charter, a discretionary power was given to the company of investing its *premiums and profits, the monies received by it in trust, and one half of its capital stock*, in the public stocks of the United States, or of any State or city, of loaning the same to any county, city, town or company, or investing it in such *real or personal security* as it might deem proper, at any rate of interest not exceeding the then legal rate.

To the power last mentioned, of investing in real or personal securities, this transaction would have to be referred for support, if it was an actual loan of money, as it is the only one which by any reasonable construction could embrace the case; and conceding that construction to be correct, the question now presented is whether the bonds of the company subsequently to fall due, is a part of "one half of the capital stock" of the company—a portion of its "premiums or profits," or whether they can be considered "monies received by it in trust." It would be a most unnecessary act to enter seriously upon this enquiry; as no ingenuity or sophistry could convert the bonds of the company, by which it obliged itself at a future time to pay money, into the actual money capital of the company, so no argument could be a more perfect demonstration than the mere statement of the facts of the case.

Nor can it be pretended that a power to lend or exchange its credit was necessary to enable the company to perform its functions. It was supposed in argument that the company might want funds abroad to meet some of its engagements, as for example to pay a marine risk for which it had become responsible. It cannot be questioned that the Company has pow-

er to do all acts which are necessary to effectuate any power granted to it, and as it might want funds abroad to answer its responsibilities, it would have the right to adopt the usual and customary means for transmitting the money. We cannot however perceive that this admitted principle has any application to this case, as it is inconceivable how the Company could place funds at a distant point, by making an obligation *to pay* money there, and exchanging that obligation for that of a person residing in this State, promising to *pay* money here at intervals, extending over the space of five years. As it is clear there is no warrant in the charter for this contract expressly given, so it is equally certain that no such authority can be implied from any power granted. It cannot be doubted for a moment, that the Legislature did not intend to permit the Company to lend or deal upon its credit; every provision of the charter forbids such a supposition. If such had been the design, why was the payment of the stock in money secured by stringent provisions? Why those limitations and guards thrown round the application of the capital when paid in? Why was the portion of the capital limited which could be invested in stocks, or real or personal security? Or why indeed, it may be asked, was any sum stated as the capital stock of the Company, when, according to this construction, its only limitation would be the extent of its credit, and its ability to find persons willing to exchange their individual responsibility for its promises to pay in future.

We are, for the reasons given, entirely satisfied that the charter of the Company did not authorize it to make such a contract as this. In the Life and Fire Insurance Company v. The M. F. Ins. Co. [7 Wendell, 31,] it was held that a company authorized to lend money, on *bond and mortgage* could not recover money lent by the corporation unless a bond and mortgage was taken for its repayment. It was also urged that it does not appear that the bonds of the Company were not to fall due at some short time, if not actually due when the plaintiff in error received them, and might have been preferred by him to the money. The testimony of Mr. Gordon is that the consideration of the bond of Smith was the obligations of the Company, received by him, and that no money passed.

It is not possible to doubt the true nature of the transaction. The bonds of the Company carry on their face the impress of their true character, and the functions they were designed to perform. They are according to the approved modern form, with "*coupons*" annexed—of convenient amounts for sale and negotiation, being in sums of five hundred and a thousand dollars—the payment of the principal postponed to a future period, and the interest payable semi-annually, upon the delivery of "*coupons*." It does not appear when they were to fall due, but they were evidently not due then, as the interest was to be paid *semi-annually*. So the bond of the plaintiff in error to the Company, was payable by instalments in five years, the interest payable *semi-annually*, and was probably designed to meet the engagement of the Company, the latter being payable in New York, the former in Mobile, a month in advance, with the difference of exchange between the two places; the bonds of the Company bearing interest at the rate of six per cent. and that of the plaintiff in error eight per cent. per annum. These facts, in connection with the testimony of Mr. Gordon, and in the absence of any countervailing proof, are sufficient to establish the fact that the Company was lending, not its capital, but its credit, the inducement being the difference between the interest it was to pay and that it was to receive on the amount lent. It is entirely unimportant what the value of the bonds of the Company was, when the plaintiff in error received them, but it is highly improbable that they were at par with, or convertible into money, but at a discount.

Some reliance was placed in argument on the twenty-sixth section of the charter, which provides, "That this act shall not be construed to confer on the said Company any rights or power to make any contract, or to accept or exercise any trust whatever, which it would not be lawful for any individual, when not restrained by statute, under the general rules of law, to make, accept or execute." This clause was doubtless added, out of abundant caution, and from an apprehension that the language employed might warrant a construction beyond what was intended in the grant of powers to the Company. The Legislature merely intended in this section, to say, and in fact have said, in intelligible language, that the powers ex-

pressly granted to the Company should not be exercised by it if, at the time, the same power could not, by law, be exercised by a natural person. To suppose that it was intended by this clause to enable the Company to make any contract, or to do any act which a natural person could make or do, would have been to abrogate all the previous limitations of the powers of the Company contained in the charter. It is too clear for argument that such is not the fact.

The plain and broad distinction between a natural and an artificial person is, that whilst the former may do any act which he is not prohibited by law from doing, the latter can do none which the charter giving it existence does not expressly, or by fair inference, to enable it to perform its functions authorize it to do; and when it transcends the limits within which it is confined by its charter, its acts are wholly void. Such is the case in this instance. The Company had no power to lend its obligations to pay money in future, the contract therefore made by it with the plaintiff in error, whether it be considered a loan of the bonds of the Company, or an exchange of credits, is void, and the security taken for the performance of this illegal contract, being necessarily void also, cannot be the foundation of any proceeding in a court of justice.

Having attained this conclusion, it is unnecessary to prosecute this inquiry further, to ascertain whether the contract was or was not usurious, as the result of the opinion already expressed is, that the decree of the Chancellor must be reversed, and a decree be here rendered dismissing the bill.

Brazier v. Tarver.

BRAZIER v. TARVER.

1. When a suit is commenced in the name of a person without his consent, and carried on for the benefit of another who claims an interest, the plaintiff on the record is authorized to dismiss the suit unless indemnity is given him against the costs, but the erroneous action of an inferior Court in allowing such a plaintiff to dismiss his suit can only be corrected by *mandamus*.
2. It is not erroneous however, to refuse to open the time which has been given in such a case to furnish the indemnity. After the time has expired the discretion of the Court is absolute and will not be controlled.

WRIT of Error to the Circuit Court of Lowndes county.

In the writ and declaration Brazier is named as the plaintiff, but in the progress of the cause he filed an affidavit, stating that it was commenced and carried on without his knowledge or consent, and he asked that it might be dismissed, and the attorney of record required to give security for costs.

The Court then ordered that the plaintiff of record should be indemnified by the person claiming the beneficial interest, by bond, with surety, conditioned to pay the plaintiff such costs as he might be compelled to pay. The order, as entered on the minutes, is silent with respect to the time when the indemnity should be given, but was really limited to four months, as appears by an entry, *nunc pro tunc*, made after the cause was dismissed. At the next term after the order for indemnity, the suit was dismissed, although the person interested then offered to give the requisite security.

The writ of error is not on file, but the assignment of error is entitled in the names of the parties to the suit, and the judgment of the Circuit Court dismissing the cause is sought to be reversed, on the ground that the security was offered within the time allowed by the order actually entered, and that it was erroneous to enter the amended order after the case was ended.

G. W. GAYLE, for the plaintiff in error.

J. P. SAFFOLD, contra.

Brazier v. Tarver.

GOLDTHWAITE, J.—The controversy here, is not between the plaintiff and defendant to the case, but results from a desire in the plaintiff named on the record, to dismiss his suit, which is opposed by one claiming to be entitled to carry it on for his own benefit in the other's name.

We think it very clear, that when a suit is once dismissed at the instance of the plaintiff upon the record, that the correctness of the proceeding cannot be inquired into, upon a writ of error; for this course would involve the defendant in a controversy in which he has taken no part, and in which he has no interest.

We do not doubt that it is the duty of a Court to protect the rights and interests of those who are beneficially interested in suits or choses in action. Such suitors can, and ought to be protected, against the improper interference of the plaintiff on the record, but the only mode to correct erroneous action in this particular, is by mandamus.

In the present case, however, we think there was no obligation cast upon the Court to open the time limited by the actual order entered upon the minutes. It is not material to inquire by which order the person in interest was to govern himself. If by that entered on the minutes, then, no time being specified, the security ought to have been given within a reasonable time; and if by the other, within four months. In either event the order was not complied with, and although, in matters of this nature, the Court might very properly open the order and allow further time, its discretion is absolute and will not be controlled.

Judgment affirmed.

WHITE v. JOY, USE, &C.

1. The act of June, 1837, inhibits the bearer of a bond or note from suing thereon in his own name, unless he can deduce a title to the same by indorsement; consequently, where a note was payable to S. L. or bearer, an action could not be maintained upon it by J. J. or bearer, for the use of S. L.—the same not appearing to have been indorsed to J. J. or any one else.

WRIT of Error to the County Court of Barbour.

The defendant in error, for the use of Seaborn Lewis, declared against the plaintiff in assumpsit, on a promissory note, made by the latter, and payable to Seaborn Lewis, or bearer. It is not alledged that the legal interest in the note has in any manner passed from the payee, or become vested in the plaintiff below. A judgment by default was rendered against the defendant for the amount of the note with interest and costs.

WILEY, for the plaintiff in error.

LEWIS and TOMPKINS, for the defendant.

COLLIER, C. J.—The only question raised by the assignment of errors is, does the declaration show that the plaintiff is entitled to maintain his action. It is an acknowledged rule, applying to judicial proceedings, that to authorize a party to sue as a plaintiff at law, he must show by the pleadings a legal interest in himself. Here, the party for whose use the suit was brought, was the payee of the note sued on, and for any thing appearing upon the record, had never made another person its proprietor. The fact that it was made payable to the beneficial plaintiff, or bearer, does not make the note suable in the name of any person to whom it may be transferred by delivery. The act of June, 1837, "To prevent the institution of illegal and oppressive suits in the United States Courts in this State," expressly inhibits such a mode of passing the legal title in a bond, note, &c.

It is insisted for the defendant in error, that as no injury can

Lockhart et al v. McElroy.

result to the plaintiff by sustaining the judgment which has been rendered, it should not be vacated. It is certainly true, that the test of error in many cases of irregularity is, can the party complaining be prejudiced; but the present is not a case of that character. Here the error is found *in limine*, and cannot be cured by ulterior considerations.

The judgment of the County Court must be reversed, and the cause may be remanded if the defendant in error desires it.

LOCKHART ET AL V. McELROY.

1. An execution may be superseded if an unjust or improper use is attempted to be made of it, although the execution be authorized by the judgment.
2. Where two judgments exist for the same debt, the payment of one is a satisfaction of both; and the attempt to coerce the payment afterwards, by execution is an abuse of the process of the Court, which may be arrested by supersedeas.

ERROR to the Circuit Court of Russell.

This proceeding was commenced by motion, in the Court below, by the defendant in error, against the plaintiff in error, as Coroner of Russell county, and his sureties, for failing to make the money on an execution, which it was alledged could have been made by due diligence, upon which the plaintiff obtained a judgment for the amount of the execution, with ten per cent. damages thereon.

An execution having issued thereon, the plaintiffs in error presented their petition to the Judge of the Circuit Court, alledging in substance that at the same time the execution was in the hands of the plaintiff in error, as coroner, an execution was also in the hands of the sheriff of the county, against the same defendant, upon which the sheriff levied and sold a sufficient amount of property to satisfy the execution. That af-

Lockhart et al v. McElroy.

ter the judgment rendered against him, but at the same term, an order was made by the Court, directing the sheriff to pay over to the plaintiff in execution the amount due thereon, it being the same for which judgment had been rendered against the coroner, and that the amount due thereon was, in fact, paid over, and payment again insisted on not by the plaintiff in execution but by an irresponsible individual. The prayer of the petition is, that the execution be superseded, and satisfaction of the judgment entered.

The Judge granted the petition and directed a supersedeas to issue.

At the return term of the supersedeas, the defendant in error demurred thereto, and the demurrer was sustained by the Court, and judgment rendered against the plaintiffs in error.

From this judgment they prosecute this writ, and assign for error the judgment of the Court sustaining the demurrer.

GUNN and BELSER, for the plaintiffs in error, cited 5 Porter, 103; 1 Johns. 426; 15 id. 395; 2 Caines, 254; 1 Johns. Chan. 49.

HEYDENFELDT, contra.

ORMOND, J.—At common law the writ of *audita querela* was provided for redress, where a matter of discharge had arisen after the judgment, as payment or release. This proceeding was in the nature of a bill in equity. [1 Bac. Ab. 307; 3 B. Com. 405.]

It has however gone into disuse from the summary jurisdiction exercised by the common law Judges, granting relief on motion, and staying proceedings during vacation, until application can be made to the Court during term time.

The ground of this jurisdiction is the power and the duty of all Courts to prevent the abuse of its process, where an improper or unjust use is attempted to be made of it. Many statutes have been passed in England regulating the modes of proceeding in such cases, and in this State we have an act declaring that "The Judges of the Circuit Courts respectively shall have power and authority in vacation to supersede any execution when it shall satisfactorily appear to them that the same shall

Lockhart et al v. McElroy.

have improperly issued from the clerk's office of any of the Circuit Courts" A bond was required to be executed by the party obtaining the supersedeas, which bond, if the supersedeas was set aside, had the force and effect of a judgment. [Aik. Dig. 165.]

In *Fryer v. Austill*, [2 Stewart 120,] this Court held that relief could not be obtained under this statute, unless the execution had improvidently issued, where the proceedings had the appearance of fairness. But this seems too narrow a view of the statute, and would deprive it almost entirely of its beneficial effects. To confine it to those cases alone, where the judgment did not warrant the execution, and thus leave unprovided for the almost infinite variety of cases where an improper or unjust use is attempted to be made of an execution which has rightfully issued, and thus drive the parties to seek the expensive aid of a Court of Chancery, would seem to defeat the very object the Legislature had in view. For it must be borne in mind, that the Judges did not derive their power to act in such cases from the statute—the whole object of which seems to have been to make the practice more efficient, by giving to the bond executed by the party making the application, the force of a judgment, if he failed in establishing his case.

The substance of the facts stated in the petition for a supersedeas in this case is, that an execution for the same debt was in the hands both of the sheriff and coroner—that the sheriff made the money on the execution in his hands, but failed to pay it over—that a motion was made against the coroner for failing to make the money on the execution in his hands, and that, on motion, a judgment was rendered against him for the amount of the execution and ten per cent. damages thereon—that subsequently the sheriff paid the debt, yet the judgment against the coroner is attempted to be enforced by execution against him, not only for the damages but also for the amount of the judgment, although discharged by the sheriff.

As the payment by the sheriff was a discharge of the judgment, it was in equity a satisfaction of the judgment against the coroner, which was founded on it, except for the ten per cent. damages, and the attempt to enforce the execution against the coroner, and thus obtain a double satisfaction was clearly unjust, and an abuse of the process of the Court. It was there-

Bell v. Crosby & Co.

fore the duty of the Judge, on these facts being properly presented, to grant a supersedeas to so much of the execution as was issued for the amount of the judgment discharged by the sheriff, leaving it in force for the damages of ten per cent., to which the plaintiff was entitled by his judgment.

The proceeding in the Circuit Court upon the return of the supersedeas, although not very regular, must be considered as a motion to quash the execution, upon a statement of facts, which the opposite party admitted to be true.

Thus considered, the judgment of the Court is erroneous; it should have been, that the execution be quashed, except for the damages of ten per cent. The judgment must therefore be reversed, and the cause be remanded, that the plaintiff may, if he thinks proper, controvert the facts set forth in the petition.

BELL v. CROSBY & Co.

1. When partners sue on a note payable to the firm, proof of the partnership as alleged cannot be required unless it is denied by a plea in abatement.

WRIT of Error to the Circuit Court of Conecuh county.

This is an action of assumpsit on a promissory note, payable to John Crosby & Co. and the suit was by John, Joseph C. and William Crosby, as co-partners, using the name of John Crosby & Co. Upon the trial of the case, on the general issue, no other evidence than the note was given, and the defendants insisted the partnership ought to be shown, and requested the Court so to instruct the jury. This was refused and excepted to. It is now assigned by the defendant as error.

J. H. ERWIN, for the plaintiff in error, cited Bell v. Rhea, Conner & Co. 1 Ala. Rep. N. S. 83.

Doe ex dem Miller v. Cullum.

LESSLIE, for the defendant, insisted that the case was controlled by the act of 1839, [Meek's Sup. 113, §5,] and that the case cited by the plaintiff was a decision upon a declaration drawn before the passage of the act referred to.

GOLDTHWAITE, J.—The fifth section of the act of 19th January, 1839, relieves plaintiffs from the necessity of proving that they constitute the firm as alledged in the declaration unless this matter is directly put in issue by plea in abatement. There being no such plea in this case, the refusal of the Circuit Court to give the charge requested was correct.

The case of Bell v. Rhea, Conner & Co. [1 Ala. Rep. N. S. 83,] is not a decision upon this statute, for the pleadings in that suit were previous to its enactment, and therefore controlled by the law as it formerly stood. The report of the case omits the date of the writ and this omission has probably induced the mistake of the plaintiff's counsel.

Let the judgment be affirmed.

DOE EX DEM MILLER v. CULLUM.

1. Where a map is referred to in a grant or deed, as indicating what is intended to be conveyed, it is considered as a part of the conveyance, and may be referred to for the purpose of aiding in the identification of the land, showing its form, location, &c.
2. Whether a monument, or boundary referred to in a conveyance, is identical with that found upon the ground, and which is supposed to answer to it is, when disputed, a question of fact for the jury.
3. It cannot be assumed as a legal conclusion, because a plot accompanying a survey, and which traces its lines, seems to indicate the point of beginning to be at or near the mouth of a branch running into a navigable stream, that, therefore, the mouth of the branch shall ever after be regarded as the starting point in measuring the land, or ascertaining its location.

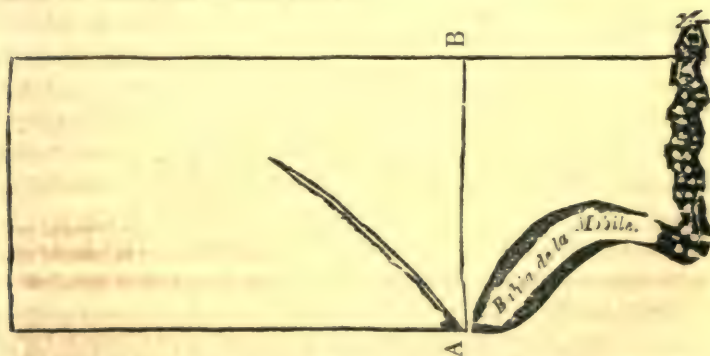
WRIT of Error to the Circuit Court of Mobile.

Doe ex dem Miller v. Cullum.

This was an action of ejectment against the plaintiff in error to recover the possession of a tract of land situate in the city of Mobile, and described in his declaration as follows, viz:— Beginning at a point in the county of Mobile, on the sectional line between section number twenty-seven and thirty-four, and twenty-six and thirty-five, township number four, south, range number one, west, and distant eight chains and thirty-nine links north from the corner post of said section, thence south eighty two degrees east, the distance of thirty-one chains to the mouth of a bayou on Mobile bay, opposite the house called the Pavillion, thence northerly at right angles with said last mentioned line five hundred feet, thence north eighty-two degrees west, to the sectional line running between sections twenty-seven and thirty-four, and twenty-six and thirty-five, thence on said line to the place of beginning.

The cause was tried on the plea of not guilty, and a verdict being found for the defendant, a judgment was rendered accordingly.

On the trial the plaintiff gave in evidence a concession for the land in question, made by the intendant, &c. of Florida, in 1807, with a plot thereto attached, the configuration of which, so far as material is here shown.



He also proved the confirmation of the concession by the United States, and adduced a certificate of survey and patent certificate for the same. Further, he "gave in evidence conveyances from the Spanish grantees to himself for land at the south side of said tract, and proved that he was in possession of the land sued for, till about 1835 or 6, when persons under whom the defendant claimed, took possession" of the same.

The plaintiff claimed that his southern boundary was a line commencing at the mouth of a branch, at the edge of the bay, as shown by the plot.

The defendant claimed, that the boundary was at a point about three chains or more north-east from the mouth, and introduced proof that there was a pine and laurel at a place corresponding with the point marked B., and that by measuring one hundred and fifty perches from B., at right angles with the north boundary of the tract, it reached the bay at the place contended for by him; and that there were marks on trees to be found at that place, and a line marked on trees running west from that point.

The plaintiff proved that a line running north from the mouth of the branch was marked on the trees, and offered proof that this was the true line of the Spanish and American surveys.

The plaintiff prayed the Court to charge the jury as follows, viz: "That the survey of the land commenced at a point marked A. on the plot, and that the point at the mouth of the branch must govern—that it was not competent to commence at the point B. and measure the distance to the bay to ascertain the starting point, if it indicated a place different from the point A. at the mouth of the branch; that they could not disregard the mouth of the branch as a starting point in the survey, to find where the true line started from; and that the point A. at the mouth of the branch controlled the survey, and could not be departed from." The Court declined to give the charge as requested, and instructed the jury that this was a question of boundary merely, and the title of the plaintiff not being disputed, it was only necessary that the premises sued for should be covered by the patent under which he claimed. The first consideration for them was, to ascertain from the evidence the lines of the plaintiff, as they were run and marked on the ground; if these lines could be ascertained, the land within them was the plaintiffs, and no more, without regard to their beginning or conclusion, or the quantity of land. But if they could not ascertain the lines as they were originally run and marked upon the ground, then they must find the beginning, and run out the plaintiff's land according to courses and distances mentioned in the grant; that the letter A. as marked on the map of the Spanish grant was contemplated as its beginning, but whether

the letter A. was placed at the mouth of the branch or not, was a question of fact for their determination. To all which the plaintiff excepted, &c.

The plot is referred to in the report of the Surveyor General of West Florida, which accompanies the concession, and is explanatory thereof. But the exact location of the land is not stated, or so described on the plot as to show whether the southeastern corner, represented by A. is located at the mouth of the branch, or a few chains north-east of that point. Though the length of the lines is shown, and it is stated that the point B. was attained by "course and direction found and taken from the point A."

The survey made under an order from the Surveyor of the United States land for this State, describes the south-east corner as the starting point, and locates that corner forty links east of the mouth of a bayou, indicated by the grant.

STEWART, for plaintiff in error. The Spanish and American surveys are identical. Each commence on the bay at the mouth of a branch. The Spanish survey evidences this by the plot where the branch is traced and the letter A. affixed, which is recognized in the grant as the point from which courses and distances are computed. The American survey describes the branch as the starting point, and from thence the courses and the distances are to be ascertained.

The proof shows that there was such a branch as the plot indicates; also, that there was a line running back from its mouth. Evidence was offered to identify this as the line of the Spanish and American surveys, and the contest was as to the southern boundary of the tract.

The ascertainment of the south east corner of the land embraced by the concession, is not a question of fact. The recital in the Spanish and American surveys determine that it is the mouth of the branch, and this determination is not the less conclusive because marks are found on trees corresponding with the assumed corner of the defendant. [6 Mass. Rep. 133; 8 Wend. Rep. 183.]

The evidences of title do not identify with exactness the land but refer to plots and surveys as showing the form, courses, distances and confines, "natural and artificial." These are

Doe ex dem Miller v. Cullum.

thus made a part of the title. [Hagan v. Campbell & Cleaveland, 8 Porter's Rep. 28-9, 31; 17 Mass. Rep. 211; 4 Wheat. Rep. 445.] The line assumed by the defendant does not appear to appertain to any survey, and cannot prevail against that, which the United States has recognized as the true one.

The commencement of a survey controls the other parts of it. [8 Wend. Rep. 183.] Natural boundary controls course and distance. [4 Wheat. Rep. 447; Hardin's Rep. 369; 2 Mass. Rep. 380.] The mouth of a creek overrules marked trees, because it is more stable, and cannot be falsified as trees may. [6 Cow. Rep. 717.]

To ascertain the south line, it was not permissible to begin the survey at B. and run south, for the survey begins and closes at A. [5 Hammonds Rep. 534.] Nor was it correct to run the eastern line the exact length indicated by the plot, it should be continued until the natural object called for was reached. [5 Pick. Rep. 135.]

The United States survey is evidence of the lines, as run on the ground, and must be so regarded; if it is in conflict with the Spanish, the latter must yield, or the grantee would be authorized to claim under both titles.

The question of boundary is not one exclusively of fact, but is a mixed question of law and fact. The instructions asked were proper, considering the nature of the evidence, and should have been given.

The counsel for the plaintiff also cited 1 Metc. & Perk. Dig. Title Boundaries, §15, 36, 60, 61, 63, 66, 67, 70, 76, 87, 89, 90, 99, 104, 105, 106.

CAMPBELL, for the defendant. The authorities all seem to establish that the decision of the Circuit Judge is correct. The line surveyed and marked on the ground is the original line, made and understood by the parties to the grant; the map is only to afford evidence of it in case of the decay of the monuments. [17 Johns. Rep. 29; 16 id. 257; 7 Wheat. Rep. 7; 1 Peters C. C. Rep. 496; 3 Peters Rep. 96; see also 1 Metc. and Perk. Dig. Title Boundaries, where the cases are collected.

COLLIER, C. J.—The question arising upon the prayer of the plaintiff for instructions to the jury is, whether the mouth of the branch traced on the map, which accompanies the Spanish and American surveys in question, is the true point of beginning, in order to ascertain the precise tract of land embraced by them.

It is true, that where a map is referred to in a grant or deed as indicating what is intended to be conveyed, it is regarded as a part of the conveyance, and may be referred to for the purpose of aiding in the identification of the land, showing its form, location, &c. Yet it can rarely, if ever, happen that it will be drawn with so much exactness as to show, without the aid of parol proof, at what precise point corners and lines are placed and marked. The identical monument or boundary referred to in a conveyance, is always subject to parol evidence; and when disputed, it must be left to a jury to say which was intended. [Claremont v. Carlton, 2 N. Hamp. 373; Blake v. Doherty, 5 Wheat. Rep. 359; Linscott v. Fernald, 5 Greenl. Rep. 496; Wing v. Burgis, 13 Maine Rep. 111; Waterman v. Johnson, 13 Pick. Rep. 267.] In the last case cited the deed described land as bounded on a pond, designated by name; it appeared that it was a natural pond, which was raised more or less at different times, by means of a dam existing and in use at the time of the conveyance, so that there was a latent ambiguity. *The Court held*, that parol evidence was admissible to show, that a certain line was agreed on, and understood at the time of the conveyance as the boundary of the pond.

It has been held, that natural or artificial monuments control the plan of survey referred to in a deed, [Esmond v. Tarbox, 7 Greenl. Rep. 61;] and they also as a general rule are considered to furnish more certain means of discovering the land conveyed than courses and distances. [Davis v. Rainsford, 17 Mass. Rep. 207; Wendell v. The People, 8 Wend. Rep. 183; Preston's Heirs v. Bowmar, 6 Wheat. Rep. 580.] In Jackson v. Moore, [6 Cowen's Rep. 717,] the Court say, "What is *most material* and *most certain* in a description, shall prevail over that which is *less material* and *less certain*. Thus, course and distance shall yield to natural and ascertained objects; as a river, a stream, a spring or a marked tree." [1

Cow. Rep. 612; 5 Cow. Rep. 371; 7 Wheat Rep. 10.] But this rule is not without its exceptions, these are to be ascertained by a reference to the reason or principle of the rule itself. *Ratione cessante, ipsa lex cessat.* Thus, where by giving to monuments a controlling influence, absurd consequences would ensue, or where it is obvious that courses and distances furnish the most certain guide to the location and quantity of the land, the latter should be followed. [Davis et al v. Rainsford, 17 Mass. Rep. 210; Chinoweth et al v. Haskell's lessee et al, 3 Peters Rep. 92.]

In Jackson v. Wilkinson, [17 Johns. Rep. 156,] it was determined, that where the place of beginning a survey is fixed and certain, the line must be run from that point, according to the courses and distances, in order to ascertain the precise position of a tract of land. [See also Wendell v. The People, 8 Wend. Rep. 183.]

When a line is actually run, it is said that it will, as traced, constitute the true boundary. "But whether the line was ever actually run or marked, and if it were so designated, *where it was*, are not deductions of law or matters of construction, but are facts to be ascertained and settled by a jury, and a Court should not, by construction, fix the line, if there be any proof whatever tending legitimately to show, that it was actually run, and where." [Dimmitt v. Loshbrook, 2 Dana's Rep. 1.]

The charge prayed assumed as a *legal conclusion* that the letter A. as marked on the map, was intended to designate the mouth of the branch, from the fact that they seemed to be placed at the same point. None of the papers made by the Spanish authorities for the purpose of conferring a title on the grantees, make any reference in terms to the branch; they speak of the Bay of Mobile being the eastern boundary of the tract, refer to the map, and A. as the point where the survey begins. Now it seems to us that it would be a most unwarrantable assumption, to hold that the place intended by A. is identical with the mouth of the branch, merely because of their apparent proximity upon paper. But suppose the Spanish concession *in totidem verbis* had recognized the mouth of the branch, as the north-east corner of the tract at the time it was surveyed would it not be admissible to show, that owing to alluvial de-

Doe ex dem Miller v. Cullum.

posits and other causes. the locality had been changed, so as by an adherence to it, greatly to increase or diminish the quantity which passed by the grant, or to change the form of the plot? Would that point still control the survey, as the place of beginning? We should incline to the opinion, that it would under such circumstances be allowable to show, the precise point on the bay intended as the corner, though the natural object designated had been gradually removed by natural causes. The branch is doubtless an inconsiderable body of water to which no riparian privileges are attached, and by the mere shifting of its bed or mouth cannot be allowed to subtract from, or add to, the soil of contiguous proprietors.

The plaintiff's counsel is mistaken in supposing that the survey made under the authority of the United States, places the north-east corner at the mouth of the branch. It is expressly stated in the return made to the surveyor, and approved by him, that that corner is "forty links east of the mouth of a bayou, as indicated by the grant," &c.

The prayer of the plaintiff, as the case is presented by the bill of exceptions, appears to have been for an entire charge, though it embraces several distinct propositions; and as it mistook the law in one very important particular, it was not error to overrule it *in toto*. To escape the consequences of a sweeping decision against him, it is most advisable for counsel to move instructions upon each point separately; the Court is not bound to distinguish what is proper from what is improper. This point has been repeatedly adjudged, both by this and other Courts.

The charge given laid down the law correctly. It assumes what the facts show to be true, that the controversy was in relation to boundaries, and that the jury were to inquire whether the land in controversy was covered by the grant and patent certificate which were given in evidence. That they should, if practicable, ascertain from the evidence the lines of the land covered by the plaintiff's claim, as they were run and marked on the ground; if these could be ascertained, the land within them was the plaintiff's without regard to quantity or the beginning or conclusion of the lines. But if the lines could not be ascertained as originally run and marked, then they must find the beginning, and run out the land according to courses

Brock et al v. Yongue et al.

and distances mentioned in the grant. That the letter A. marked on the map accompanying the grant, indicated the place of beginning; whether that was at the mouth of the branch or not, was a question of fact for the determination of the jury. That this charge is unexceptionable, it is only necessary to refer to the law as we have stated it from the books cited.

From the view taken it results that the judgment of the Circuit Court is free from error, and it is consequently affirmed.

BROCK ET AL V. YONGUE ET AL.

1. A plaintiff in ejectment must recover on the strength of his own title, and if that is not sufficient to enable him to maintain the action, it is unimportant what the title of the defendant is.
2. When the plaintiff in ejectment claims by a sale under execution, it is not necessary that he should deduce a regular chain of title subsisting in the defendant in execution; it is sufficient if he shows a legal title in the defendant at the time of the rendition of the judgment.
3. The rule that this Court will not reverse a judgment though the Court below may have erred in its charge to the jury, where it is clear from the entire record that the plaintiff cannot recover, is confined to those cases where the matter relied on to affirm the judgment, notwithstanding the error of the Court, is uncontroverted.

ERROR to the Circuit Court of Talladega.

This was an action of trespass to try title by the plaintiffs against the defendant Yongue, Joseph H. and Jacob T. Bradford, being admitted to be the landlords of the defendant were permitted to defend for, and with him as tenant in possession and having pleaded not guilty a verdict was found in their favor, on which the Court rendered judgement.

A bill of exceptions taken at the instance of the plaintiffs in error discloses that it was proved, on the trial that a judgement was obtained by Loney W. Madison, and Edmund F.

Lattimore, against David Conner in the Circuit Court of Talladega for eight hundred and eight dollars. That an execution issued in June, 1838, was returned not satisfied, and that an alias and pluries were also issued and returned in the same manner. That on the 6th July, 1840, an *alias pluries* issued and was levied by the sheriff on certain lands, being the same sued for in this action, as the property of Conner, the defendant in execution, which after due advertisement were sold by the sheriff to the plaintiffs for thirty-five dollars, and a deed executed by him to them therefor.

It was further proved that a writ of error bond was executed by Conner, the defendant in execution, with surety in September, 1838, the cause taken to the Supreme Court, and the judgment affirmed at the February term, 1839. That a certificate of affirmance was issued by the Clerk of the Supreme Court on the 15th June, 1841, and was received by the Clerk of the Circuit Court shortly after. The Clerk's cost and County tax had been paid, as appeared by an entry on the execution docket, but whether before or after the execution issued on which the sale was made, the Clerk did not know.

The Clerk testified that the execution which issued anterior to the one on which the property was sold had been *superseded* by a writ of error, *coram vobis*, having issued before any certificate of affirmance from the Supreme Court was sent to him.

It further appeared that neither the original bond executed by Conner for the writ of error, nor a copy thereof was on file in the Clerk's office, but that the original was sent with the record to the Clerk of the Supreme Court, and that executions were regularly issued on the judgment, as if no writ of error had been taken.

It was also proved that one Walker was liable for the same debt on which the judgment against Conner was founded. That a judgment was obtained against him and fully discharged by payment to the plaintiff before the execution on which the land was sold was issued, but no satisfaction had been entered on the judgment against Conner, although it was entirely satisfied except the costs.

It was also proved that at the rendition of the judgment and issuance of the first execution, Conner was in possession of the

land sued for—that after the issuance of the first execution, Conner conveyed the land to one Wyche, in trust to secure one Hall as surety of Conner—that afterwards Conner and Hall united in a conveyance of the and to the Bradfords, who subsequently sold the same to the defendant. Yongue executed to him a bond for title, and put him in possession, who vouched the Bradfords to defend his title.

Upon this testimony the plaintiff moved the Court to charge the jury—

1. That if they believed the defendants had no other title to the lands sued for than that acquired by virtue of the deed of trust, and by virtue of conveyances made by the defendant in execution since the rendition of judgment, and since the issuance of the first execution thereon, they should find for the plaintiffs.

2. That the defendants were estopped from denying that Conner had title. That to entitle the plaintiffs to recover, it was only incumbent on them to show the judgment, execution and sheriff's deed. Which charge the Court refused to give, and instead thereof, charged, that if the plaintiff had not shown title to be in Conner at the rendition of the judgment, or issuance and levy of an execution, by a regular chain of title from the government of the United States down to Conner, they should find for the defendants. To the refusal to charge and to the charge as given the plaintiffs excepted, and now assign for error.

S. F. RICE, for plaintiff in error, insisted that the charge moved for should have been given. That there was no necessity to prove the title of Conner, the defendant in execution, at the rendition of judgment, because the defendants in this suit, as well as the plaintiffs, claim through Conner. He cited 12th Johns. Rep. 213; 3 Wash. C. C. R. 546; 10 Johns. 291; 7 id. 186, 277; 4 id. 202, 16; 10 Wheat. 223; 1 Caine's, 444; 2 id. 215; 3 id. 188; 4 Cowan, 599; 7 id. 637; 9 id. 233; 8 Wen. 620; 13 Johns. Rep. 97; 14 id. 224. He argued that this was the only question presented on the record, and that no point was presented as to the fact that the execution was superseded by a writ of error bond, at the time the sale was made.

Brock et al v. Yongue et al.

CHILTON and SILAS PARSONS, contra, contended that conceding the argument of the opposite counsel to be generally true, that it did not appear in this case that the deed of trust to secure Hall and the conveyance by Hall and the defendant in execution to the Bradfords, had been delivered or accepted by them, or that they relied on those deeds for title to the premises; and cited 20 Johns. 184; 3 Philips Ev. 1283; 1 Johns. Cases, 114; 10 Mass. 456; 12 id. 461; 3 N. Hamp. 304. And if mistaken in that view, that the charge was correct, because the lien of the judgment was destroyed by the execution of the bond for a writ of error.

ORMOND, J.—This was an action of trespass to try title. The plaintiff claimed under a sale by execution. It is very certain that the plaintiff in ejectment must recover by the strength of his own title; if that is not sufficient to enable him to maintain the action, it is a matter of profound indifference to him what the title of the tenant in possession is. The charges moved for, therefore, which are based on the supposed insufficiency of the title of the defendant, were properly refused.

In the charge given, however, the Court erred. The substance of the charge is, that the plaintiff was bound to shew a regular chain of title from the United States down to the defendant in execution, at the time of the rendition of the judgment. As it respects the title of the defendant in execution it was only necessary to show that it was a legal title, subsisting in the defendant at the rendition of the judgment. Such as it was, it passed to the purchaser by the sale under the execution.

It is, however, insisted that this Court will not reverse because it appears from the record that the judgment under which the plaintiff derives his title had lost its *lien* by a writ of error having been sued out and a bond given to supersede the execution, and that the defendant's title accrued while the writ of error was pending, and before the affirmance of the judgment.

It is true that this Court will not reverse a judgment, though the Court may have erred in its charge, where it is clear from the entire record that the plaintiff never can recover, and such

Edgar v. Cook, Adm'r.

would be the consequence of the facts here supposed, as was held by this Court in the case of Campbell v. Spence, at the present term. It appears, however, that there was some controversy about the bond executed to obtain a supersedeas, and without intending to intimate that the fact that the bond was taken by a deputy clerk, or sent to this Court with the record, would vary the case, it is sufficient that these questions are contested, to prevent the application of the rule above stated. A proper case for its application would be one where the matter relied on to affirm the judgment, the error of the Court notwithstanding, was uncontroverted.

Let the judgment be reversed and the cause remanded.

EDGAR v. COOK, ADM'R.

1. A clause in partnership articles, by which the partners agree that the partnership shall continue for a specified time, notwithstanding the death of one or more of the partners, has not the effect, even when considered in connection with the act of 1839, [Meek's Sup. 181,] to render the administrator of the estate of a deceased partner liable at law upon a contract made by the surviving partners.

WRIT of Error to the Circuit Court of Wilcox county.

This is an action of assumpsit against Cook, as the administrator *de bonis non* of Jesse W. Norwood, deceased, on several notes described in the declaration, as made by the firm of Garrison, Ryan & Co. of which firm Norwood is averred to have been a member.

An agreed case was made between the parties, which declares these facts:

In February, 1837, Jesse W. Norwood, William C. Garrison and Joseph S. Ryan, entered into co partnership, under the firm name of Garrison, Ryan & Co. for the purpose of mer-

Edgar v. Cook, Adm'r.

chandizing, at Prairie Bluff, Alabama. By the articles of agreement between these parties, it was stipulated that the partnership should continue for the term of five years, and this notwithstanding the death of either partner. Norwood was to put in the business eleven thousand dollars, and the others contributed nothing except their personal services. The profits at the end of the term, after paying Norwood the sum advanced by him, were to be equally divided between the partners or their personal representatives.

Norwood died on the 29th July, 1837, and in the fall of the same year Garrison purchased, in New York, the goods for which the notes were given, for the firm, and signed with its name. The goods were purchased and the notes dated 9th September, 1837. Garrison, when he purchased the goods, disclosed the fact of Norwood's death, and showed the articles of partnership. Before this period the firm had transacted no business, except to purchase a lot and build a store house.

Administration was granted on Norwood's estate the 29th August, 1837, to the defendant, Daniel Cook, C. M. Pegues, A. M. Norwood, and Joseph S. Ryan. These afterwards resigned, and letters of administration, on the 20th day of November, 1837, were granted to Cook alone.

On the 25th of January, 1838, Garrison, Ryan and Cook, the administrator, made an agreement in writing, under seal, reciting the substance of the articles of partnership and agreeing that the same should that day be dissolved. At the same time another agreement, under seal, was executed by them, and by its terms Garrison and Ryan alone were authorized to collect the debts due the firm. On the same day Garrison and Ryan executed a bond, with security, to Cook, as administrator, to pay all the debts of Garrison, Ryan & Co., and Cook executed to Garrison and Ryan his bond, whereby he acknowledged to have received from them the capital invested by Norwood, and obliging himself to save them harmless from all claims by the administrator or distributees of Norwood, for the money advanced and for the profits of the concern.

The business of the firm, under the name of Garrison, Ryan & Co. continued up to the 25th January, 1838, in pursuance of the articles of partnership, and then it was dissolved by the agreement of the survivors and Cook, the administrator.

Edgar v. Cook, Adm'r.

The Circuit Court gave judgment in favor of the defendant, and this is now assigned as error.

DARGAN, for the plaintiffs in error, cited 7 Peters, 594; Collyer on Part. 120; Story on Part. 275, 299, and notes.

PECK, contra.

GOLDTHWAITE, J.—The only matter to be determined in this suit is, whether a clause in partnership articles, by which the partners agree that the partnership shall continue for a specified term, notwithstanding the death of one or more of the partners, can have the effect, when considered in connection with the act of 1839, to render the administrator of the estate of a deceased partner liable at law upon a contract made by the surviving partners.

The effect of a clause in partnership articles, like those before us, to confer rights on the surviving partners, or to impose duties on the personal representatives of one, that dies has not been ascertained by any judicial decision, so far as we have been able to ascertain. There are cases, however, clearly settling, that when a trade is carried on in consequence of directions in the will, that the general assets of the testator are not responsible, but only such as are directed to be invested in the business. [Ex parte Garland, 10 Vesey, 110; Ex parte Richardson, 2 Back, 202, cited in Collyer on Part. 356.] And if this trade is a partnership the executor becomes a partner, and is individually responsible as such, although the trade is carried on for the benefit of appointees under the will. [Ex parte Garland, before cited; Weightman v. Townroe, 1 M. & S. 412; Alsop v. Mather, 8 Conn. 587.]

As such consequences follow the act of intermeddling with a partnership, it is perfectly evident that it must be optional with the executor, even where an apparent duty is imposed by the will, to refuse to connect himself with the business by receiving the profits; and it seems to be equally evident that an administrator cannot prejudice the interests of either creditors or distributees, by connecting himself with the surviving partners of his intestate.

The consequence of these principles is, that if an administra-

Edgar v. Cook, Adm'r.

tor chooses to continue the funds of his intestate in a partnership, to be used for the purpose of the trade and for a community of profit, he makes himself personally responsible, and a creditor of the concern has no remedy against the estate.

It is not our intention to determine what the effect of such a clause is as between the partners themselves, or how far a creditor of the surviving partners, who becomes such after the death of one co-partner, has a right to pursue the specific fund invested by the deceased partner in the firm, and afterwards withdrawn by his administrator, because this case is not now presented in a proper condition, or with proper parties, for such a determination; but it is allowable to remark, that even in that respect the case is not free from difficulty. If such a clause is effectual for any period after a death intervenes, there is much difficulty in assigning a limit to the continuance of a partnership. So likewise it might be urged, that it was contrary to public policy that the entire effects of a deceased person should be tied up from his creditors to abide the result of a long continued and, perhaps, hazardous business.

On the other hand, it is by no means clear that such clauses can have been introduced in such articles for so long a period without having been considered by the profession as having some legal effect. Whether they have any, or if any, what effect, has yet to be settled. [See *Gratz v. Bayard*, 11 S. & R. 41.]

The cases to which we have adverted seem to leave no doubt that in such a case as this, the creditor has no claim upon the general assets of the estate, and as the effect of a judgment in this suit would be to subject them, the right must grow out of the statute to which our attention has been called, if it exists at all. This statute provides, "That when any person shall have a cause of action against any co-partnership, any of the members of which may have died, such person shall be permitted to sue and recover of the representatives of the deceased partner, without having first prosecuted the surviving partners to insolvency, any law, usage or custom to the contrary notwithstanding: *Provided, &c.*" [Meek's Sup. 181.]

The act evidently cannot be construed to give a right of action against the personal representative of the deceased partner, except in those cases where all the assets of the estate

Howard and Holman v. Kennedy's Ex'rs.

could be made subject to the judgment. Having shown that whatever may be the rights of the plaintiffs here, they do not extend thus far, it follows that the statute has no operation on the case before us.

Judgment affirmed.

HOWARD AND HOLMAN v. KENNEDY'S EXR'S.

1. The judgment in ejectment is binding only on the parties thereto and their privies; and one whose possession is distinct from that for which the action is brought, cannot be ousted by an execution. But the defendant by a transfer of his possession *pendente lite*, cannot defeat the action; the plaintiff, notwithstanding, may proceed to judgment and eject the assignee.
2. Where under a judgment by default against the casual ejector, a person in possession who was a stranger to the proceeding, and claiming under a title *prima facie* valid, distinct from and disconnected with the plaintiff's, is ejected, the judgment and execution may be set aside, and the person thus ousted let in to defend the action.
3. When a motion by one, who shows *prima facie* that he was illegally dispossessed under a judgment and execution in ejectment, has been made to set the same aside, is overruled, the plaintiffs in the motion may prosecute a writ of error.

WRIT of error to the Circuit Court of Mobile.

This was a motion by the plaintiffs in error, at the Spring term of the Circuit Court in 1842, to set aside a judgment by default, rendered at the preceding term, in an action of ejectment, in which Doe ex dem Kennedy's executors was plaintiff, and Isaac H. Lewis and Norman Otis, were tenants in possession. The motion was founded on these facts: It appears by affidavits filed, that the lessee of the plaintiffs in error, in November, 1836, brought an ejectment in the District Court of the United States at Mobile, for the recovery of a lot in the City of Mobile. This lot was then in possession of one Ingraham, as the lessee of the representatives of Thomas Mather, deceased, who claimed title as derived from the same source as the title

Howard and Holman v. Kennedy's Ex'rs.

the plaintiffs were seeking to enforce; and consequently adverse to theirs. Service of the ejectment was made on Ingraham, and the action was fully defended by counsel. In May, 1838, a verdict and judgment were rendered for the plaintiffs; on the 17th July thereafter, a *Habere facias possessionem* was issued, and on the next day the plaintiffs' attorney was put in possession by the Marshal. At the time of the execution of this writ, Lewis and Otis were the lessees of Mather's estate, but had left the city and no one was in the actual occupancy. The attorney of the plaintiffs continued to occupy the premises for them up to 1840, when he let Mr. J. C. Gwin into their possession, as a tenant, to the first of November, 1842.

On the 18th April, 1838, the testator of the defendants' lessors brought an action of ejectment in the Circuit Court of Mobile, for the recovery of the south half of the same property, of which notice was given to Lewis and Otis, the tenants in possession. The plaintiffs' attorney, who seems to have managed the property for their benefit, explicitly denies all notice of the pendency of the suit; and avers that he does not believe that the plaintiffs or any of their tenants were informed of it. Lewis and Otis did not appear to defend, and a judgment by default was rendered against the casual ejector; and on the 6th of May, 1842, the executors of Kennedy were put into possession of the part of the premises claimed in their declaration.

The validity of the claim of Kennedy's executors to the property in dispute, depends upon the settlement of a question of boundary, which has never been adjudicated; though the line heretofore recognized by old proprietors, is adverse to its establishment. *Further*, five or six other suits, involving the same inquiry, have been pending for several years, and still are undetermined.

The attorney of the plaintiffs further declares, that from the evidence that has come to his knowledge, he entertains a confident belief that Holman and Howard can successfully defend their possession, if permitted, against the claims of the defendants in error. The Circuit Court overruled the motion, and its judgment thereupon is here assigned for error.

ADAMS, for the plaintiffs in error. A judgment in ejectment

ascertains the plaintiffs right of possession, only as against the defendant and those in privity with him. It does not operate *in rem*. Hence, if pending the action, the defendant is evicted by a stranger, the suit will abate on plea. [Com. Dig. Abatement, H. 54; 14 Mass. Rep. 490.]

The judgment in ejectment gives no right of entry as against one not a party to the action. [1 Marsh. Rep. 333-4; 2 id 40; 7 J. J. Marsh. Rep. 626; 1 B. Monr. Rep. 232; 5 Monr. Rep. 540-1.] In cases analagous to the present the remedy is by writ of restitution. [5 Taunt. Rep. 204; Adams on Ejectment, 306, n. 1, 2; Marsh. Rep. 40; Pet. C. C. Rep. 444-5; 2 Hals. Rep. 161; 7 id. 277; 1 Caine's Rep. 500; 3 Cow. Rep. 291; 5 id. 418; 9 id. 233; Mitchell Arguendo.] Here we are willing, if placed in possession, to defend the action of the defendants in error, without a suit *de novo* being brought against us.

As to the right of a landlord to defend where his tenant is sued, see 3 Burr. Rep. 1290; 1 Bibb Rep. 128; Pet. C. C. Rep. 444; 6 J. J. Marsh. Rep. 34.]

A writ of error has been allowed in cases somewhat analagous. [Minor's Rep. 250; 1 Stewt. Rep. 385; 1 S. & P. Rep. 158, 159, 187; 7 Porter's Rep. 55; 9 id. 686; 2 Ala. Rep. N. S. 140; 1 Marsh. Rep. 333-4; 2 id. 40; 1 Bibb's Rep. 128; 3 id. 366; 4 id. 88; 6 J. J. Marsh. Rep. 34; 3 Binn. Rep. 275; 12 Johns. Rep. 31, 67.]

STEWART, for the defendant, insisted a writ of error would not lie in a case like the present; that the refusal to allow the motion was not such a definitive sentence or judgment as an appellate Court would revise. The practice in England or the United States, independently of *local rules* of practice, would not sustain a motion such as was submitted to the Circuit Court. There is no pretence that any rule of this Court, previous to those adopted at the last term would authorize it.

COLLIER, C. J.—The questions to be considered are—1. Against whom does the judgment in ejectment operate? 2. Is it competent for the Court rendering the judgment, after the writ of *Habere facias possessionem* has been executed, to set aside the execution and judgment, and let in a stranger, (hav-

ing *prima facie* a valid title,) to defend, who it appeared was not in privity with the defendant? Is the refusal to set aside a judgment and execution under such circumstances revisable on error?

1. The judgment in ejectment determines the right of the plaintiff to recover of the defendant; and is binding only on the parties thereto and their privies; consequently, no tenant whose possession is distinct from that for which the action was brought, can be ousted by an execution. Thus in *ex parte Reynolds*, [1 Caine's Rep. 500,] the Court say, "It is a settled rule of practice, that no tenant who was in possession anterior to the commencement of an ejectment, can be dispossessed upon a judgment and writ of possession to which he is no party." [See also *Chiles v. Stephens*, 1 Marsh. Rep. 333; *Kircheval et al v. Ambler*, 7 J. J. Marsh. Rep. 626.] But the defendant cannot, by a transfer of his possession, *pendente lite*, defeat the action; the plaintiff may, notwithstanding, proceed to judgment and eject the assignee. If the law were otherwise, it would be in the power of the defendant to put the plaintiff to his new action as often as he thought proper to assign. [*Jackson v. Tuttle*, 9 Cow. Rep. 239-40.]

2. This is a novel question in this Court, and we must consequently be guided by principle and the decisions of other judicial tribunals. In *Doe ex dem Troughton v. Roe*, [4 Burr. Rep. 1996,] a judgment was regularly obtained against the casual ejector by default; the landlord of the premises moved to set aside this judgment, because his tenant had not given him notice of the action. The plaintiff insisted, that his judgment being fairly and regularly obtained, could not be affected by the failure of the tenant to notify his landlord. But the Court were, however, of opinion that possession ought not to be changed by a judgment in ejectment, where there has been no trial or opportunity of trying; the rule which requires service upon the tenant in possession, is with the view that the tenant should give notice to his landlord, that the cause may be tried between the parties interested in the question. It was accordingly ordered, that the judgment signed in the cause, and the writ of possession issued thereon and executed, be set aside—that the costs occasioned by the judgment and taking possession, together with the costs of the motion be paid by the ten-

ant in possession—and that the landlord of the tenant be made defendant (as in the conditional rule,) and that he shall not upon the trial of the issue to be joined between the parties, set up an unsatisfied term or any trust estate to defeat the lessor; and also to admit the lessor was siezed of the premises in question. To the same effect is *Doe ex dem Grocer's Company v. Roe*, [5 Taunt. Rep. 205.] So in *Den ex dem Sheppard v. —*, [2 Hals. Rep. 161,] the attorney for the plaintiff at the preceding term, had signed a judgment by default against the casual ejector, and issued a *Habere facias possessionem* in vacation, which had been executed. The defendant moved the Court to set aside the judgment and execution, upon an affidavit that plaintiff's attorney had agreed to draw up and exchange consent rules with the defendant's attorney; this being relied on, defendant gave no farther attention to the suit, and judgment was entered without defendant's knowledge, though he had a good defence. It was insisted, that although the judgment should be set aside, the *Habere facias possessionem* could not be avoided, or any order made for the restitution of the premises; but the Court directed that the judgment and execution be set aside, and a writ of restitution issue upon the payment of costs.

Where it is shown to the Court by affidavit, that one having no privity with the defendant, but in possession anterior to the commencement of the action, is turned out by a writ of possession against another, a writ of restitution will issue to restore him to the possession from which he has been irregularly ousted. [Ex parte Reynolds, 1 Caine's Rep. 500.] And in *Chile's v. Stephen's* [1 Marsh. Rep. 333,] it was determined, that if a man was turned out of possession by *Habere facias possessionem*, who was neither party or privy to the judgment, he may maintain a writ of forcible entry and detainer. In that case, one of the Judges thought a writ of restitution was the proper remedy; this was not denied by the others, who were of opinion that it was not the exclusive remedy. See also, *Stephens v. Chiles*, [1 id. 334,] in which it was adjudged, that the party ousted having elected to proceed for a forcible entry and detainer, was not entitled to a writ of restitution.

Adams in his treatise on ejectment [225], thus states the law on this point: "Judgments against the casual ejector, irregu-

larly obtained, will, as a matter of course, be set aside; and as the situation of claimant and defendant in ejectment are materially different, the Courts are liberal in their rules for setting aside judgments against the casual ejector, although really signed; and will grant them even after execution executed, upon affidavit of merits, or other circumstances, which at their discretion they may deem sufficient. The regular mode of setting aside such judgments, is by rule of Court, for the party having obtained the judgment to give up the possession; but if the circumstances of the case do require it, the Courts will order a writ of restitution to be issued." [See Jackson ex dem. Norton v. Stiles, 3 Caine's Rep. 133; Jackson ex dem. Eden et al. v. Rathbone, 3 Cow. Rep. 291; Jackson ex dem. Sutherland et al. v. Stiles, 5 Cow. Rep. 418; Den v. Johnson, 7 Hals. Rep. 277; Jackson v. Stiles, 4 Johns. Rep. 489; Jackson v. Hawley, 11 Wend. Rep. 182.]

In the case before us, it is shown by the affidavit of the counsel of the plaintiffs in error, that the parties to this cause claim under titles adverse to each other, that the plaintiffs recovered the possession of the premises by verdict and judgment in ejectment, prosecuted against the lessee of the representatives of Thomas Mather, deceased. The defendants recovered a judgment by default against the casual ejector in an ejectment, of which other lessees of the representatives of Thomas Mather, deceased, had notice, and under a *Habere facias possessionem* thereon issued, they were put in possession. The plaintiffs were in possession under their judgment, almost four years before they were ousted. Of the pendency of the defendants suit, neither the plaintiffs or any of their tenants, had notice. It further appears, that the validity of the claims of the respective parties, depends upon the adjustment of a question of boundary, which has never been adjudicated; although several suits involving the same question, have been pending for years. The plaintiffs counsel declares his confidence in the superiority of their title.

If the authorities cited correctly ascertain the law, it is perfectly clear that the plaintiffs have been irregularly ousted, and that the Circuit Court should have caused them to be restored to the possession. The judgment in the action prosecuted by the defendants, did not determine the validity of the plaintiffs

title or their right to the possession; it was decisive of no question in which they were interested, and could in no manner prejudice their rights. The titles set up by the respective parties, are wholly distinct from each other, and it could only have been ascertained by suit litigated by them, who had the superior claim to the premises. It seems to us unnecessary to extend our views on this point, as a mere comparison of the facts with the citations we have made, sufficiently show what is the law applicable to the case.

As the judgment of the defendants does not at all affect the plaintiffs, (the tenants to whom they gave notice of their action having no connection with their title or possession,) it might perhaps be questioned, whether any terms should be annexed to setting aside the execution and restoring them to the possession. But we decline considering this question, as the plaintiff voluntarily consents that the ejectment may be reinstated, and to defend against the same.

3. In respect to the last question, we consider it closed by previous decisions of this Court. In *Creighton v. Denby*, [Minor, 250,] a judgment of the Circuit Court refusing to quash an execution was reversed on error. And in *Wilkerson v. Goldthwaite*, [1 Stew. and P. Rep. 159,] a judgment of the Circuit Court upon a motion to allow a judgment to be amended *nunc pro tunc*, was held revisable on error; especially as the costs of the motion were ordered to be taxed against the plaintiff in error. This case is precisely analogous in principle to the one at bar. We might add other authorities from our own reports, if it were necessary, but those cited are sufficient to show that the writ of error should be entertained.

The consequence is, the judgment is reversed and the cause remanded.

BANKS v. LEWIS.

1. A plea containing matter in abatement and concluding in bar, is bad as a plea in abatement and may be taken advantage of on demurrer.
2. A plea in abatement to a suit commenced by attachment because of a defective affidavit should set out the affidavit on *oyer*.

Error to the County Court of Russell.

This action was commenced in the Court below by original attachment. The defendant at the appearance term pleaded in abatement, "that said plaintiff ought not to have and maintain the said attachment against the defendant, for this, to wit: that the said plaintiff is and was, at the time of suing out the same, a resident of the State of Georgia, of which the defendant was at said time, and is also a resident, and that said plaintiff omitted to state in his said affidavit for suing out said attachment, *that the defendant had not sufficient property in the State of his residence, within the knowledge or belief of plaintiff to satisfy said debt*, which said averment is required by law to be made in the affidavit of a party suing out an attachment, when and where both the plaintiff and defendant reside out of the limits of the State of Alabama. Wherefore the defendant prays the judgment of this Court, whether the said plaintiff can have and maintain his said action against this defendant," &c. The plea was verified by affidavit.

To this plea the plaintiff demurred, and the Court overruled the demurrer. The plaintiff then asked leave to reply to the plea and traverse the facts therein contained, but the Court refused to permit the plaintiff to reply, and dismissed the attachment, notwithstanding the plaintiff objected to trying an issue at the return term.

From this judgment this writ is prosecuted by the plaintiff, who assigns for error—

1. In its judgment on the demurrer to the plea.
2. In rendering judgment for the defendant.

Elliott, use, &c. v. Montgomery.

BELSER and HARRIS, for plaintiff in error, contended that the plea was bad, because it began and concluded in bar, and contained matter in abatement, and that oyer should have been craved of the affidavit. [2 Porter, 249; 9 id. 195; 1 Chitty's Pleading, 496; Gould's Pleading, 29, 293.]

ORMOND, J.—The plea in this case cannot be sustained. The authorities cited show that a plea containing matter in abatement and concluding in bar, is bad, as a plea in abatement. The conclusion of a plea in abatement is a prayer that the writ be quashed—the denial that the plaintiff can maintain his action is an admission that the writ is properly sued out.

It was also necessary that the affidavit should have been set out on *oyer*, that the Court might have been able to judge whether the affidavit was defective or not. [Findley v. Pruitt, 9 Porter, 195.]

Let the judgment be reversed and the cause remanded.

ELLIOTT, USE, &C. V. MONTGOMERY.

1. Where a note is made by an association of individuals as a banking company and it is made payable to one of themselves, or bearer, if it is put in circulation without any indorsement, a *bona fide* holder may institute suit in the name of the payee, for his use, against any other member of the association.

WRIT of Error to the Circuit Court of Fayette.

This action is upon two twenty dollar notes, against the defendant, as a partner of the Real Estate Bank of Caledonia, Mississippi. It was commenced before a Justice of the Peace, and was carried to the Circuit Court by appeal. At the trial it appeared that the notes were signed by certain persons as the President and Cashier of the Company and by them the prom-

Elliott, use, &c. v. Montgomery.

ise was to pay the sum of money to John Elliott, or bearer, on demand, at their banking house. Elliott was a partner in the concern when the notes were issued, and was merely the nominal plaintiff, without ever having been the owner of the notes, or without having given any consideration for them.

The Court thereupon instructed the jury, that as Elliott and the defendant were both partners in the association, the action could not be sustained in the name of the former, even as nominal plaintiff for the use of the real owner.

The plaintiff excepted, and now assigns this charge as error.

HUNTINGTON, for the plaintiff in error, cited 1 H. B. 569.

COCHRAN, contra.

GOLDTHWAITE, J.—If the rules of the common law could be applied to the circumstances of this suit, it would not be questioned that any *bona fide* holder of the notes could maintain an action in his own name as the bearer; and such we presume is the law of the State, where these notes were made and first put in circulation. But it seems to be conceded on all sides, that so far as the remedy is concerned, it must be sought according to the law of the State where the suit is instituted, and here the holder is placed in a very peculiar position. If he attempts to sue in his own name, as the bearer of the notes, he is met by a statute prohibiting such a suit; and when he sues in the name of the payee, it is objected that he is a partner, and cannot sue a co-partner. We apprehend it is very clear that there must be some legal remedy to enforce the right which the holder is entitled to, and that it will not answer the requirements of justice to say that he can have no relief except in a Court of Equity.

Our statute directly prohibits the holder of such a note from suing in his own name, unless it is indorsed to him. [Meek's Dig. 108, §1.] Its principal object, however, was to change the then existing law, so as to prevent the institution of suits in the Courts of the United States upon notes payable to bearer, which in those Courts had been construed to be a *direct* promise to any *bona fide* holder, and therefore, that any such,

Elliott, use, &c. v. Montgomery.

when a citizen of a different State from that of the defendant, could sue without any indorsement; when, if such an indorsement had been necessary to pass the legal interest in the note, the Court would not have had jurisdiction unless the payee as well as the plaintiff was the citizen of a different State from that of the defendant.

We apprehend that even with this statute in force, if an association of individuals shall make a note payable to one of the partners, for the purpose of enabling either themselves or him to put it in circulation without indorsement, there would, notwithstanding be an available remedy at law for any *bona fide* holder. Such an act designedly done, would be a gross fraud, and if ignorantly committed, would seem to be within the principle recognized in the Pl. & M. Bank for the use of Sayre, Converse & Co. v. Blair & Morroh, at this term.

The rule that one partner cannot sue another at law, is subject to many exceptions, and as soon as it was shown in this case, that the notes were put in circulation by the Company, and that the interest in them, instead of being in the nominal plaintiff, was in the person for whose use the suit was brought, as a *bona fide* holder, the defence asserted ceased to be available.

The only plausible objection which we can conceive to the action in this form is, that it may sometimes be necessary to enforce payment against the partner who is also the payee. It is not necessary that the Court should now express an opinion upon that case, but for myself I see no reason why, even there, the general rule should not yield to the necessity for giving a speedy and effectual remedy at law. The cases of Tutlock v. Harris, 3 Term, 174; Vere v. Lewis, id. 182; Minnet v. Gibson, id. 431; S. C. on Error, 1 H. B. 569; Callis v. Emmett, id. 313, are conclusive to show that Courts will always mould their proceedings so as to afford a remedy, although at first view it may seem to be inconsistent with principles generally recognized. In all of these cases, bills of exchange, payable to fictitious payees were put in circulation, but the Courts very properly held, notwithstanding the general rule that the payee must indorse the paper, that the *bona fide* holder was entitled to declare upon them as payable to bearer.

The State v. Covington et al.

These views lead us to the conclusion, that the action was properly instituted in the name of the payee, although a partner.

It follows that the charge given to the jury was erroneous, and the judgment is therefore reversed and the cause remanded.

THE STATE v. COVINGTON ET AL.

1. Where several persons are indicted and found guilty of a conspiracy, a motion in arrest of judgment will be entertained at the instance of any one or more of them, although the others are not in Court, and may have actually escaped from custody.

The defendants were indicted in the Circuit Court of Cherokee, for a conspiracy; they were all tried on the plea of "not guilty," and a verdict was returned as follows: "We, the jury, find the defendants guilty, and assess their fine to twenty dollars each."

A motion was made to arrest the judgment, on the grounds as alledged, that the indictment did not charge an offence known to the law; and was insufficient. The Solicitor objected to any decision of the Court on the motion, because two of the defendants who had been found guilty, viz: Anderson Hodges and William Hodges, had escaped from custody and were not in Court. The Court refused to entertain the motion and referred the questions of law thereupon arising to this Court, as novel and difficult.

A further motion was made by Josiah Covington, one of the defendants, to arrest the judgment, for the same reasons as the first; which was in like manner objected to, disposed of, and referred.

Although the record does not discover it, it is agreed by the parties that a judgment was rendered on the verdict.

The State v. Covington et al.

ATTORNEY GENERAL, for the State. The defendants are charged in the indictment with a joint offence, they submitted the question of their guilt to the jury at the same time; and must be taken to have united their fortunes "for weal or woe." The Circuit Court should not have rendered separate judgments; and properly refused to decide on the reasons in arrest of judgment, while two of the defendants were absent. [Rex v. Elizabeth Nichols, 2 Strange's Rep. 1227; Rex v. Spragg, 2 Burr. Rep. 930; 1 Salk. Rep. 400; Rex v. Teal, 11 East's Rep. 307; Rex v. Askew, Maule & S. Rep. 9, 10; 1 Chitty's Cr. L. 541; 7 Dane's Ab. 264.]

RICE, for the defendants. The escape of two of the defendants could not prejudice those who submitted themselves to the judgment of the Court; they had no control over their co-defendants, who were either in the custody of their bail or the law. The constitution guarantees to all persons charged with offences against the law, privileges which cannot be impaired or taken away, either by the form of the indictment, or the acts of those jointly charged with them. [Bill of Rights, §10, 11; 2 Ala. Rep. 102; see also, 3 M. & S. Rep. 9, 10, 68; 3 Chitty's Cr. L. 1138-40-43.] No inconvenience will result from entertaining the motion; if the judgment is arrested, the defendants may be tried *de novo*. [1 Stew. Rep. 31; 2 Ala. Rep. 102.] And the refusal to consider it, cannot bring back those who have escaped. But if such a result were the necessary consequence, a conviction upon an insufficient indictment could not be supported; and the defendants who appear may call upon the Court to determine whether it is legal. [Rice's So. Car. Rep. 1]

COLLIER, C. J.—In *The King v. Teal and others*, [11 East's Rep. 307,] two of the defendants were found guilty of a conspiracy, and one of them appeared in Court, and by his counsel moved for a new trial; but the Court refused to entertain the motion in the absence of the other, unless a special and separate ground was laid for dispensing with the general rule, that all parties must be present in such cases. It was, however, remarked, that the Court would bear in mind what passed when the defendants were brought up for judgment,

and if, upon considering the report of the Judge who presided at the trial, they were of opinion that there ought to be a new trial, they would of their own accord award it. And afterwards Lord Ellenborough said, "that the Court had considered the objections which had been made to the trial, and though not in the form of a motion for a new trial, yet with the same benefit to the parties concerned; and they were of opinion that there was no foundation for either of them." So in *The King v. Askew and others*, [3 M. & S. Rep. 9,] three persons were convicted of a conspiracy, and two of them only being present, moved for a new trial, the Court of King's Bench adhered to the case of *The King v. Teal and others*, remarking, however, that if upon looking into the report of the trial they saw reason to think that justice was not done, they could set aside the verdict or do whatever might be proper. [See also, *The King v. Lord Cochrane*, 3 M. & S. Rep. 10, note.] But in *The King v. De Berenger and others*, [3 M. & S. Rep. 67,] eight persons were indicted and found guilty of a conspiracy. Six of the defendants appeared to receive judgment, and two of them moved in arrest of judgment. Although this case was decided at the same term with those cited from the same book, yet no objection was made to the motion in consequence of the absence of some of the defendants; but it was entertained and overruled. The failure to make the objection would seem to indicate that a motion in arrest of judgment was not governed in this respect by the rule applied to a motion for a new trial, and that the Court would look into the record to see if the conviction was free from error.

The cases cited by the Attorney General from 2 Burrow and 1 Salkeld, are entirely unlike the one at bar. The former merely determines in accordance with *Rex v. Nichols*, [2 Strange,] that a motion for a new trial, or in arrest of judgment, in the case of a conviction of an indictable offence, will not be entertained in the absence of the party on whose behalf it was made; the latter, that it will not be adjudicated in his absence, where the punishment to be inflicted is corporal.

We cannot well conceive how any one found guilty of offending against the criminal laws, can be denied the right of objecting to the legality of his conviction. The constitution it has been supposed, except in certain excepted cases, guarantees

to the accused the right to demand an indictment before he can be put upon his trial as an offender "against the peace and dignity of the State." [The State v. Middleton, 5 Porter's Rep. 484.] And he certainly should be permitted to object, even after verdict, that the indictment does not charge in a legal manner a breach of law. Conceding that where a conspiracy is proved against several, each will be held liable for an act done in furtherance of the common intent, yet the nature of the offence does not inhibit each from insisting, after verdict, that he was improperly, or irregularly convicted. If the law were otherwise, those who were guilty and satisfied with the verdict, might by absenting themselves, or refusing to co-operate, in a motion to arrest the judgment, compel those who were dissatisfied with the conviction, to submit to punishment in despite of justice. Such a state of things cannot be tolerated; but each defendant must be allowed to present to the Court any exception which the law recognizes. The Constitution would seem to require this.

In a civil case where a judgment is rendered against several, either may sue a writ of error in the name of all, and obtain a severance as to those who refuse to join in assigning errors: and if an application was made for a writ of error to this Court by either of the defendants in the present case, if the record showed a sufficient objection to the regularity of the proceedings, we cannot see how it could be refused. To expedite justice and lessen expense, we think it would be best for the primary Court to entertain a motion in arrest of judgment. The cases cited in respect to a motion for a new trial appear to depend upon a rule of practice recognized in England; and if strictly applicable there, where the judgment is sought to be arrested, we think it cannot be followed here.

The sufficiency of the reasons in arrest of judgment, are not referred for our decision, but only the propriety of considering them. On this point we have stated our opinion; and our conclusion is, that the motion should have been entertained. That it may be adjudicated by the Circuit Court, a copy of this opinion will be transmitted thither.

TOWNSEND AND GORDON v. EVERETT, USE, &c.

1. The surety of a County Treasurer, on his official bond, is bound for the monies of the county in the hands of the Treasurer, at the time of the execution of the bond, although a previous bond then existed with different sureties. But if the money had been wasted by the Treasurer, or appropriated to his own use, before the execution of the last bond, the sureties on the first bond would alone be responsible.
2. The surety of a County Treasurer, to his official bond, is bound by those acts of the Treasurer which by law, as Treasurer, he is required to perform—the annual settlements, therefore, of the County Treasurer, and the statement to his successor in office of the amount of public money in his hands, being acts which by law, as treasurer, he was required to perform, are evidence against his surety in an action against him on the official bond of the Treasurer.

ERROR to the Circuit Court of Mobile.

This was an action brought by the defendant for the use of the Treasurer of Mobile county, against the plaintiffs in error, as principal and surety in a bond made by Townsend as County Treasurer of Mobile county, dated 30th November, 1839, in the penal sum of thirty thousand dollars, with the usual statutory condition.

The declaration sets out the condition of the bond and assigns as a breach the refusal to pay by Townsend to Stickney, his successor, the money in his hands on demand made for that purpose.

The entry of the pleas is, "Defendants cravedoyer and payment, and performance, pleaded in short by consent."

The jury found the issues for the plaintiff, debt ninety-four hundred and forty dollars and ninety cents, damages fourteen hundred and seventy-eight dollars and fifty-four cents. It is therefore considered, &c. that the plaintiff recover from the defendants the sum of ten thousand seven hundred and nineteen dollars forty-four cents, &c.

From a bill of exceptions taken pending the trial it appears that the declaration was filed and the pleas put in at a former term of the Court, as they appear written in the record. At the time of the trial the defendants proposed to add the word

Townsend and Gordon v. Everett, use, &c.

separately at the end of the plea, and which they had written in pencil a day or two before the case was called for trial, to which the plaintiff objected. The Court sustained the objection, and the word *separately* was erased, to which the defendants excepted.

The plaintiff read in evidence the bond of Townsend, dated the 30th November, 1839, and proved that Townsend was duly elected Treasurer of the County of Mobile, on the — day of September, 1839, and then offered in evidence an official report of Townsend to the proper Court, and that the same was accepted and recorded: this report bears date 9th December, 1839. To the introduction of this report, the defendant, Gordon, objected, because it embraced monies received by Townsend before the date of the bond, and because it was not otherwise evidence against the security. The objection was overruled, and the defendants excepted.

The plaintiff proved by William Magee, that he was Tax Collector in February, 1840; that on the 8th February, 1840, he paid to Townsend, as Treasurer, \$3,914 30, and also proved a demand of Townsend, by the plaintiff, as successor, of the money, books and papers held by him as Treasurer; that Townsend resigned in May, 1840, and that Henry Stickney was his successor, and closed his case.

The defendant then proved by Magee, that he paid to Townsend the amounts mentioned in a paper, (exhibit C.) at the dates and in the sums therein mentioned, and that the same was all the money paid by him as Tax Collector, from 3d February, 1839, until May, 1840, the time of his resignation. The defendant Gordon, then, for the purpose of impeaching the report and explaining the same, offered in evidence County orders in the possession of Townsend, the dates, amounts, &c. of which are set forth in exhibit D., but there was no proof when the same were paid. Also, that an order issued to the Treasurer in favor of J. K. Collins for \$5000. On which \$2,448 48, was paid on the 30th November, 1839. Also, a certificate in favor of Joshua Kennedy for \$3,393—on which \$3000 was paid 5th December, 1839.

The defendant, Gordon, also proved that Townsend had been County Treasurer of Mobile County, from the 3d of February, 1836, until the 3d of February, 1839, and produced his bond

Townsend and Gordon v. Everett, use, &c.

as such Treasurer, dated 25th July, 1836, with A. W. Gordon and T. Sandford, as his sureties, and proved that a suit is now pending in the Circuit Court for a breach of the bond, commenced 27th April, 1842, and also proved that Townsend received large sums of money during his first term, and closed.

The plaintiff, to rebut defendant's proof, then proved that Townsend resigned in May, 1840, that after his resignation he made an official report to his successor, dated 9th May, 1840, acknowledging a balance in the treasury of \$9,240 90, to the credit of the county. To the introduction of which the defendant, Gordon, objected, but the Court overruled his objections, and he excepted thereto.

The defendant's counsel then asked the Court to charge the jury, that if they believed that Townsend was County Treasurer from February, 1836, to February, 1839, with one set of securities, and that he did not settle his accounts with the County Court before his second appointment, and was appointed a second time in September, 1839, with different securities, and made default, the securities of the last bond are not liable for the default of the principal under the first bond, and if a general account of both terms is brought up, and a balance struck thereon, that the security of the latter is not liable at all for the sums so admitted—which charge the Court refused, and charged that for any money Townsend had collected and received as County Treasurer, and had in his hands, at the time of the execution of the bond declared on, and for any received after the execution of the same, and which he had not paid over, he and his sureties are liable in this action; and if the defendants insist that the sureties of the first bond are liable, the jury must be first satisfied that there was a default under that bond. To the refusal to charge, and to the charge as given, the defendants excepted.

The assignment of error is the matter arising out of the bill of exceptions.

CAMPBELL, for plaintiff in error.

DUNN, contra, cited 9th Porter 186; 1 Peters, 168; 9 Cranch 237; 5 Peters, 373; 15 id. 207; 2 Bailey, 380; 2 Wash. C.C. 473; 1 Monroe, 171.

Townsend and Gordon v. Everett, use, &c.

ORMOND, J.—The refusal of the Court to permit the pleadings to be amended, being a pure question of discretion addressed to the Court below cannot be reviewed in this Court.

Two questions are presented on the bill of exceptions:

First—Is the surety of the Treasurer bound upon his bond for monies which came to the hand of his principal before the execution of the bond?

Second—Are the statements made by the Treasurer of the County, in his reports of the state of the County Treasury, evidence against his surety?

1. The condition of the bond is, that Townsend, the Treasurer, “shall, from time to time, and at all times, render a just and true account to the Commissioners Court of Roads and Revenue of Mobile county, when thereto requested, of all the monies, securites, stock and other property of said county, which shall come to his hands, or be committed to his charge, and deliver the monies, securities, stocks and other property of said county in his hands, together with all documents, &c. to his successor,” &c.

The statute makes it the duty of the County Treasurer to receive and keep the monies of the county, and to disburse the same according to law, [Aik. Dig. 424, §7,] and it cannot admit of question, that his official bond covers all the money which is in his hands, belonging to the county at the time of its execution, as much so to all intents and purposes as if he had received it afterwards. [Farrar and Brown v. The United States, 5 Peters, 373.]

In this case, it appears that the Treasurer had received money belonging to the county anterior to the execution of this bond, and whilst a different bond with a different surety existed. As there is nothing in the act requiring the bond to be taken, which would authorize the presumption that it was intended to cover *past* derelictions of duty, it is very clear that if this money had been wasted or appropriated to the use of the Treasurer, before the bond here sued on was executed, the surety in the former bond would alone be responsible, and to that effect the Court charged the jury.

There is some obscurity in the charge moved for by the defendants, but it appears to assume that, as the Treasurer did not settle his accounts until after the execution of the last bond,

the surety in the latter is not responsible for money received by the Treasurer, while acting under the first bond. But it is not the *receipt* of money by the Treasurer which renders the surety liable; it is his failure to disburse it according to law. It is true that the Treasurer is required to settle his accounts annually, but the surety can claim no exemption from this failure of the Treasurer to perform his duty. The fact that he did not settle his accounts until after the second bond was executed, which is assumed in the charge moved for, if true, would not be conclusive to show that there was a misapplication of the money of the county previous to that time. The law requiring annual settlements to be made by the Treasurer, [Aik. Dig. 426, §21,] gives a specific penalty for such failure, but does not make it evidence of a defalcation. Nor does it follow, that because the treasurer may have faithfully disbursed all the monies received by him, since the date of the last bond, that he had before that time wasted, or misapplied the monies previously received by him; *non constat* but that the monies previously received were in the County Treasury at the time the last bond was executed. A strong presumption that such was the fact arises from his report made a few days afterwards, in which he admits a larger sum to be in the Treasury of the county, than the defalcation found by the jury at the trial.

2. This brings us to the next inquiry, whether the reports of the Treasurer are binding on his surety? We do not consider it necessary, in this case, to go into the inquiry how far the surety is bound by the *declarations* of the principal, made in reference to his conduct as Treasurer, whilst in office; as he certainly is bound by those *acts* which, as Treasurer of the county, his principal was bound to perform, and for the performance of which he was surety.

The statute requires the Treasurer to account with the Commissioners Court annually, and upon his *resignation* or *removal* from office, to *state the account*, and deliver the money and other effects of the County to his successor, and these acts when done are as obligatory on the surety as on the principal. The precise object of this accounting is to show the state of the Treasury, or in other words, the amount of the public money in the hands of the Treasurer and the security, afforded by

Townsend and Gordon v. Everett, use, &c.

the bond, would be perfectly illusory if the surety was not bound by the act, when done, to the same extent as the principal. We are unable to perceive any difference, as it respects this question, between the surety of a Sheriff and the surety in this case, and it cannot be questioned that the return of a Sheriff upon an execution, that he had made the money thereon, would be evidence of that fact against his sureties. So it has been held, that the entries of a Teller of a Bank, in a book in which he daily stated his account as Teller, was evidence against his surety. [State Bank v. Johnston, 1 Rep. Con. Court, 464.] To the same effect is Pendleton v. Bank of Kentucky, 1 Monroe, 171.

The only doubt which could exist in this case, is the propriety of the admission of the account stated by Townsend after his resignation, showing the amount of money in his hands as Treasurer of the County, as evidence against his surety.

It may be conceded that the acts or declarations of a principal, which will be evidence against the surety, must be made or done in the performance of the duty for which the surety is responsible; but the concession will not avail the surety in this case, as that is literally the fact here, even as it regards the report made by the Treasurer to his successor in office, of the amount of public money in his hands. The rendition of this account to his successor, is a part of his duty as Treasurer, and is not in the nature of an admission, which he might make or withhold at pleasure; but is as obligatory on him, and as much a part of his official duty, as the annual account which he is required to render to the Commissioners Court: and has, indeed, precisely the same object in view—the ascertainment of the state of the Treasury.

We are not, however, to be understood as deciding that the account thus rendered is *conclusive* on the County; it is certainly, however, *prima facie* evidence against the Treasurer. It is an *act* which he is required as Treasurer to perform, and which, when performed, is evidence both against him and his surety.

The result of this examination is, that the judgment of the Court below must be affirmed.

The Planters' and Merchants' Bank, use, &c. v. Blair and Morroh.

THE PLANTERS' AND MERCHANTS' BANK, USE, &C.
v. BLAIR AND MORROH.

1. When a creditor receives a note from his debtor with other persons as security, and the note is made payable to a Bank, under the expectation that it will be discounted, the securities are not discharged by the refusal of the Bank to discount it, but the creditor may sue in the name of the Bank, or transfer the note to another, who may in like manner use the name of the Bank to collect the money.

WRIT of Error to the Circuit Court of Greene County.

This is an action of assumpsit by the Planters' and Merchants' Bank of Mobile, for the use of Sayre, Converse & Co. against Blair and Morroh, as the makers of a note, by which one Briley as principal, and themselves and one Adcock as sureties promised to pay to the President and Directors of the said Bank \$729 12, twelve months after the 15th of June, 1838.

The cause was tried on the general issue, and the proof was that sometime previous to the date of the note the witness had conversed with the principal in the note and one Horton, and from this the witness learned that Briley, the principal, was indebted to Horton \$2,000, or upwards. The debt, as the witness understood from those persons, arose from advances of cash made by Horton to Briley. In order to facilitate the payment of the debt, Horton proposed to Briley that it should be divided into three parts, to which the latter assented, and afterwards, and when this agreement was made, Briley called at the house of the witness, in company with Adcock, to carry it into effect, and requested the witness to attest his and Adcock's signature to these notes, made pursuant to the said agreement. The note sued on is one of those notes. The witness heard nothing said as to the reason why the notes were made in the form they were, but supposed them to be so made at the request of Horton. The witness also stated facts, showing an advance or loan to Horton by Briley of \$2,000 in 1837.

The Planters' and Merchants' Bank, use, &c. v. Blair and Morroh.

The defendant proved by the Cashier of the Bank, that the note sued on did not belong to it, nor had he any knowledge of the suit until his evidence was taken. It was admitted the note was in the form prescribed by the Bank for notes to be discounted by it.

No evidence was given to show that defendants knew any thing of the transaction between Horton and Briley, nor that they had any notice of any consideration given for the note by Horton.

Upon this state of facts, the Court charged the jury, that in the absence of any knowledge or notice of the facts stated by the plaintiff's witness, as to the transaction between Horton and Briley and Adcock, the defendants were not liable to this action. The plaintiff excepted, and the defendants having had a verdict and judgment in their favor, the charge of the Court is now assigned as error.

THORNTON, for the plaintiff in error, cited *Commercial Bank of Natchez v. Claiborne et al*, 5 Howard, 301; *Bank of Rutland v. Buck*, 5 Wend. 66.

MURPHY, contra.

GOLDTHWAITE, J.—The circumstances in evidence when this case was tried, have no tendency to establish a fraudulent contrivance, either by Briley, the principal in the note, or by Horton, to whom it was given. The material inquiry is, whether a sufficient consideration is shown or may be presumed? and is not, as assumed by the Circuit Court, whether these defendants were informed of the manner in which Horton or Briley intended to use the note.

In the absence of any evidence upon the matter, the presumption is that all the sureties intended to be bound for the sum of money expressed in the note, and it is entirely immaterial whether it is paid to the Planters' and Merchants' Bank or to another. Conceding that the presumption could properly be drawn that the sureties intended the note to be discounted by the Bank, the primary object certainly was, so far as can be inferred, from the absence of any proof to the contrary, to benefit Briley. This benefit has been received by him, and there-

The Bank of the State of Alabama v. Martin & Huntington.

fore the principal object for which the note was made has been attained. The cases are numerous to show, that when a note is made payable to a Bank, and with the expectation that it will be discounted, it does not discharge the sureties if the principal raises money on it by another mode; and that in such a case the holder is entitled to use the name of the Bank for the purpose of collection. [Bank of Rutland v. Buck, 5 Wend. 66; Chenango Bank v. Hyde, 4 Cowen, 567; Powell v. Waters, 17 John. 176; Utica Bank v. Ganson, 10 Wend. 314; Commercial Bank of Natchez v. Claiborne, 5 Howard, 301.]

Let the judgment be reversed and the cause remanded.

THE BANK OF THE STATE OF ALABAMA v. MARTIN AND HUNTINGTON.

1. Where a contract was entered into for the performance of professional services, the value of which was to be ascertained by arbitration, if the parties could not agree; if the party for whom they are rendered refuses to have them arbitrated, *assumpsit* will lie for a *quantum meruit*.
2. Where professional gentlemen agree with their client, that as it could not be known what business they would be required to perform, they would receive for their services what any gentleman of the bar would consider reasonable, this is an agreement to arbitrate, and will not bar an action.
3. An agreement by counsel to attend to the litigated business of a Bank, pending and to be brought before the Courts, to the end of the then current year, does not oblige the counsel to attend to such as are undetermined at the end of the year.
4. The act of 1839, in prescribing the salary of the Attorneys of the State Bank and its branches, applies alone to the regular Attorney in the different Banks, who is elected by the Directors, and does not inhibit the Banks from the employment of such other professional assistance as their interest may require.

WRIT of Error to the Circuit Court of Tuscaloosa.

This was an action of *assumpsit* by the defendants in error against the plaintiff, to recover damages, for services rendered

The Bank of the State of Alabama v. Martin & Huntington.

by them as attorneys and counsellors at law, in the prosecution of suits, and in giving professional advice. The cause was tried on the plea of non assumpsit, and a verdict and judgment rendered in favor of the plaintiffs below, for twenty-five hundred dollars and eleven cents. On the trial the defendant excepted to the ruling of the presiding Judge, from which it appears that the plaintiffs adduced evidence tending to show the performance of professional services by them as alledged, at the defendant's request. The defendant then offered a letter, addressed by the plaintiffs to the defendant, of which the following is a copy:

Tuscaloosa, July 15, 1841.

Gentlemen—In reply to your proposition to engage our services in the litigated business of the Bank, pending and to be brought before the Courts during the remainder of the year, stipulating also, as a part of our duty in the engagement, that we shall take such steps in procuring the testimony in those cases as we may be able to do, we have to say we are willing to enter into the engagement; and as to the compensation, we are willing to take such as any gentleman of our profession would consider reasonable, or would engage to do it for; we add this, because it is not known, nor can it be ascertained, what amount of business will be required to be done by us. As you mentioned the limited authority of the board to make expenditures for this kind of service, and the pressing demand for aid to your attorney, from an increased amount of business, we are willing, should the business of the Bank in which our services are required, demand a charge by us, larger than the Board may feel authorized, without further authority from the Legislature to pay, to rely for any excess on that body.

Very respectfully,

MARTIN & HUNTINGTON.

Messrs. *John Marrast* and *Joel White*, Committee, &c.

It was also proved by the defendant, that the letter of the plaintiffs contained the contract between the parties, under which the plaintiffs performed the services in question. The evidence further showed that the plaintiffs had attended from the date of the letter, until the end of the year 1841, to the liti-

The Bank of the State of Alabama v. Martin & Huntington.

gated cases of the defendant in Court; and that some of these cases were yet undisposed of—that after the expiration of that year, the plaintiffs rendered to the defendant an account for their services, upon the reception of which, the defendant, without notice to the plaintiffs, took the opinion of third persons as to the value of their services, and voted as an equivalent therefor the sum of five hundred and sixty dollars; but the plaintiffs refused to accept the same. That plaintiffs had offered to submit the matter in controversy to some member of the Tuscaloosa bar, which defendant declined; that they had asked permission to have attorneys examined before the committee of the Bank Directors having the matter in charge, which was denied.

The defendant's counsel moved the Court to charge the jury that the evidence in the cause had shown a special contract between the parties, and that the plaintiffs could not recover in the form of action adopted. This charge was refused, and the Court instructed the jury, that if they found that the defendant had, without notice to the plaintiffs, or asking or obtaining their participation in the matter, undertaken to fix the value of their services, after receiving their account, the plaintiffs were not bound by the acts of the directors, but were authorized to sue in the form in which they had declared, and recover so much as their services were worth.

To the refusal to charge, and to the charge given, the defendant excepted.

The defendant's counsel also prayed the following charge, that the plaintiffs' undertaking by their letter was entire, and if any of the litigated cases of the defendant which were in Court when the plaintiffs were employed, were yet undisposed of, they could not recover; which was refused. But the Court charged the jury, the plaintiffs had performed their contract, if they had attended to those cases during the year 1841.

To the refusal to charge, and the charge given, the defendant excepts.

The defendant's counsel further prayed the Court to charge the jury, that the act of February, 1839, restrained the defendant to the appropriation of one thousand dollars for legal services for one year, and that the Directors had no authority to

The Bank of the State of Alabama v. Martin & Huntington.

contract for or employ services which required the payment of a greater sum; which was refused. But the Court charged the jury, that under the act of February, 1839, the defendant had no power to employ a general attorney for one year at a greater salary than one thousand dollars; and for that sum they had a right to his services during that period, in all legal matters, but if it became obvious, that from pressing exigencies the general attorney was inadequate to the successful management of the defendant's business, and the interest of the Bank was likely to suffer, then the Directors had a right to contract for, and compensate such additional legal services as the exigency of the case required.

To the charge given, as well as the refusal to charge, the defendant excepted.

B. F. PORTER, for the plaintiffs in error, insisted—

1. That the proof shewed, there was a special contract; and on that the plaintiff should have declared, as they are bound to abide by its terms. [2 Porter's Rep. 376; Chitty on Con. 19 to 21; 2 Starkie's Ev. 71, note 1.]

2. The construction of the contract is, that the Board of Directors would pay what was allowed. The facts disclosed in the bill of exceptions show that they had voted what was thought to be a just allowance to the defendants in error, for their professional services, and that the latter refused to receive that sum. They are not in law entitled to more. [2 Starkie's Ev. 72.]

3. The act of February, 1839, inhibited the Board from contracting for legal services at a price beyond one thousand dollars for a year, and the Circuit Judge should so have charged the jury.

PECK and WM. COCHRAN, for the defendants. It is needless to inquire whether the contract between the parties was special or not, as a conclusion either way is wholly immaterial. If special, the plaintiff in error, by refusing to adopt the means it prescribes to ascertain the value of the defendants' services, released them from all obligation so to consider it, and authorized them to declare on a *quantum meruit*: on their part no

The Bank of the State of Alabama v. Martin & Huntington.

further act was required, but they were entitled to be paid the value of their services.

2. The Board of Directors had no authority to determine what sum should be paid to the defendants in error for their services. This in the event of disagreement was to be ascertained by a professional gentleman; but this mode of adjustment, though proposed by the defendants, was refused by the plaintiff in error. In this proposition the defendants did more than the law required; for it is settled that a stipulation in a contract to submit matters which may arise to arbitration, will not bar an action.

3. The act of 1839, relates to the regular attorney, elected by the corporation for a year, and not to such extraordinary professional services as the interest of the Bank may require. This conclusion is apparent from an examination of the statute, and the cause of its enactment.

COLLIER, C. J.—The elementary writers upon pleading concur in laying down the law, that where the demand is merely of a pecuniary nature, and is founded upon a past or executed consideration, it is sufficient to declare upon the common *indebitatus* counts. [1 Chitty's Plead. 316.] And such will be found to be the conclusion of the adjudged cases. Here the declaration is framed upon the idea, that the services for the performance of which the plaintiff had undertaken, had been performed, and that the defendant had refused to pay an equivalent therefor. The rule we have stated applies to such a case. In another point of view, the form of declaring which was adopted was clearly permissible. The defendant refused to submit to the arbitrament of a member of the legal profession the ascertainment of the value of the plaintiffs services; as the paper relied on as a contract contemplates. This indicated an unwillingness on the part of the defendant to have the extent of the liability of the Bank admeasured, as the plaintiffs proposed; and authorized the latter to recover upon a *quantum meruit*. The case of *Randolph v. Perry*, [2 Porter's Rep. 376,] which was cited at the argument is entirely unlike the present. There the question was, whether a valid and intelligible contract in writing, could be set aside and sub-

The Bank of the State of Alabama v. Martin & Huntington.

stituted by a verbal agreement without consideration, which was materially different in its terms; the Court very properly determined that it could not.

The contract which is evidenced by the plaintiffs' letter does not authorize the Directors to fix the value of the plaintiffs' services. They propose, that inasmuch as it could not be known what amount of business would be required of them, that their compensation should be left for future adjustment; and that they would receive what any gentleman of the bar would consider reasonable. This, at most, is an agreement to arbitrate, and will not bar the action. In *Stone v. Dennis*, [3 Porter's Rep. 239,] the Court say, "it is clear, that a party, by agreeing to submit his case to arbitration, does not lose his remedy at law, unless at the time of the commencement of his suit there is an arbitration pending, or an award has actually been made; and a contract absolutely to waive one's right to go to law, is void, as against public policy." See to the same effect *Bozeman v. Gilbert*, 1 Ala. Rep. N. S. 90.]

The agreement was to attend to the litigated business of the Bank, pending or to be brought before the Courts from the time the plaintiffs were retained to the end of the year. If any of the cases should not be determined during that period, the plaintiffs were under no obligation to give further attention to them. The term for which they were engaged was expressly limited, and the contract different from that under which counsel are usually retained in this State.

The section of the act of February, 1839, which it is supposed inhibited the employment of the plaintiffs by the Directors of the Bank is as follows, viz :

"That the several attorneys of the Bank of the State of Alabama and its Branches, shall hereafter receive an annual salary of one thousand dollars, payable quarterly, and no more."

Previous to this act, the attorneys for the Banks were compensated by a stipulated fee, in each case, which was uniform, without regard to the amount of professional labor, or skill, which was required for its prosecution or defence. Such was the number of suits, during some years, by some of the Banks, that at least five times the prescribed salary was occasionally paid to an attorney. To remedy what the Legislature con-

The Bank of the State of Alabama v. Martin & Huntington.

ceived to be a prodigal expenditure of money, the act in question was passed. It applies alone to the regular attorney, who is elected by the Directors, as an officer in the respective Banks; and does not, expressly or by implication, restrain them in the employment of such other professional assistance as the interest of the Bank may require. The power of the Directory of the Bank of the State would be plenary, independent of any express delegation by the Legislature; but they are expressly authorized by its charter to appoint such officers, &c. as shall be necessary for executing the business of the corporation. [Aik. Dig. 57.] It is important that they should be invested with such an authority; for it might so happen that the Bank would require the services of an attorney at law in another State, or in different counties of this State at the same time. Unless, under such circumstances, the Directors could employ and compensate as many professional gentlemen as the interest of the Bank required to be retained, the business of the corporation might very materially suffer. Whether the Directors, in entering into the contract with the plaintiffs, did that which was expedient and proper, under the circumstances, is a question not submitted to us, but the inquiry is, did they exceed their powers? On this point we have expressed our opinion.

Our conclusion upon the entire case is, that the judgment of the Circuit Court should be affirmed.

LONG & LONG v. BROWN ET AL.

1. A Court of Equity will not interfere between the parties to a contract, though it be executory, where no fraud has intervened, but will leave them to seek the redress their contract provides for, unless there be some special ground of equitable interposition—as where in a sale of land the covenants are independent, and the vendor cannot make the title and is insolvent.
2. An allegation that the complainant has reason to fear, and does fear, that the defendant cannot make title, and will be unable to respond in damages, is too vague, loose, and uncertain to be the basis of any action in a Court of Chancery.
3. It is no ground for granting or continuing an injunction to a judgment at law that there is a mistake in the description of lands in a bond for title, without also showing that the other party, on application, refuses to correct the mistake.
4. In such a case, the correction can be made by the adult parties, though infants have an interest in the title bond.
5. The grant of sixteenth sections, by the act of Congress of second March, 1819, is in perpetuity to the inhabitants of the several townships, but the legal title to the land is in the State, in trust for the inhabitants of the respective townships in which the lands lie.
6. A sale of a sixteenth section, pursuant to the act of the Legislature is valid, and binding on the inhabitants of the township.
7. Whether the acquiescence of the inhabitants of a township in an irregular sale, and receipt of the interest of the purchase money, would not be a waiver of such irregularity—and whether the issuance of a patent would not preclude all inquiry into the regularity of the sale—*Quere*.
8. Affidavits cannot be read on a motion to dissolve an injunction, in opposition to the answer, except in the case of an injunction to stay waste.
9. An injunction may be dissolved on the answer of one defendant, if he alone is charged with knowledge of the facts.

APPEAL from the Chancery Court at Talladega.

The bill was filed by the plaintiffs in error, and alleges that they purchased of the defendant, Brown, the sixteenth section, in township nineteen, range six, east—the north east quarter of the north east quarter and the south east quarter of the north east quarter of section seventeen, in the same township and range, all in the Coosa land district, at the price of six thousand dollars, to be paid in three payments, and executed to him three notes for two thousand dollars each, falling due annually, on the 25th December, 1840, 1841, and 1842—he exe-

cutting a bond for title, by which it was intended to secure to complainant good and perfect titles to said land, including relinquishment of dower, upon the payment of the purchase money.

That in describing the land in the title bond, either by fraud or mistake, the south east quarter of the north west quarter of section seventeen, is inserted, instead of the south east quarter of the north east quarter of that section, and that the land so purchased and not conveyed is essential to the enjoyment of the residue.

That at the time of the purchase they were informed by Brown that said sixteenth section had been regularly sold under and by authority of the statute authorizing such sales, and that he would be able to make good and perfect title to the same, "but your orator, after diligent inquiry at the proper office, and of many persons who had opportunity to be correctly informed on the subject, cannot learn of any evidence that will sustain the legality of such sale. On the contrary they believe said sale was irregular and void, and that many of the material requisitions of the statute authorizing such sales, were not complied with.

That a mill was erected on a part of the land, and defendant assured complainants that the works were executed in a workmanlike manner, and that the abutments of the dam were run into the bank for its security—but that such was not the fact, and that the tenons of the works were not more than from two to four inches, when they should have been from six to eight inches, in such works, and that complainants had no power to correct these misstatements, as the parts were invisible. That the dam has been washed away by a freshet.

That N. & H. Weed & Co. of Philadelphia, as indorsees of the first note, have commenced suit thereon, and obtained judgment thereon, and that it was not till judgment was obtained that complainants learned that they were like to lose the land from the inability of defendant to make title. That the most valuable part of the land was entered at the land office by one Price, who has departed this life without making defendant any title, and that his widow refuses to relinquish dower but on certain conditions, which they do not know that the defendant can perform. That execution has been sued

Long & Long v. Brown et al.

out on the judgment, and suit brought by Weed & Co. on the second note. That they have reason to fear, and do fear, that defendant will be wholly unable to make them title according to his contract, and they fear he will be unable to respond to them in damages. Notwithstanding all which, the parties are urging the collection of the money, &c.

The prayer of the bill is, that Brown and N. & H. Weed & Co. be made parties to the bill, and for an injunction, &c.

The Chancellor granted the injunction, according to the prayer of the bill.

Annexed, as an exhibit to the bill, is the title bond of Brown, the condition of which is, "Now be it known, that when said J. & J. Long shall well and truly pay and satisfy said notes, then the said Warner Brown binds himself, his heirs, &c., to convey, by general warranty deed, the above described land, and bargained premises, to the said John and James Long, or their heirs, and also, to procure the relinquishment of his wife, then this obligation to be void, else to remain in full force."

To this bill the defendant, Brown, answered, admitting the sale of the land, as stated in the bill, and the mistake as stated, but says that the title bond was drawn by one of the complainants—that he was never advised of the mistake until the filing of the bill, and would at any time, if applied to, have corrected it. That in regard to the sixteenth section, he has no recollection of making the statements attributed to him, but may have done so, and avers that the sale was regular, so far as he knows or believes, and has heard no complaint, and avers that no difficulty can arise as to the title. He denies all fraud or misrepresentation in regard to the title or the nature or value of the improvements, but that the whole matter was fully known and understood, and minutely examined and discussed between the parties before the purchase.

He denies that the widow of Price claims dower in the land, and states that she is willing to make title to the land on the payment of the purchase money, which he will be prepared to make when it falls due. He denies that he is unable to respond in damages, if necessary, but avers his ability. He also exhibits his titles to the land in controversy.

Upon this answer the Chancellor dissolved the injunction,

and refused to permit the complainant to read affidavits in support of the bill.

From this decree the Chancellor granted an appeal on condition that the complainants executed a refunding bond within twenty days. The bond was not executed until after the expiration of the twenty days.

The plaintiffs now assign for error—

1. That the Chancellor erred in dissolving the injunction.
2. In hearing the motion, when all the parties had not answered.
3. In refusing to hear affidavits in support of the bill.

RICE, for the plaintiff in error, contended, that there was no authority for selling the sixteenth sections, and that the sale was absolutely void. He maintained that the grant from Congress to the inhabitants of the township, created a corporation by implication, and that the subsequent assent by Congress to the State Legislature to sell the sixteenth sections, was a mere void act—and that if it were not, the consent of the *inhabitants* was not obtained by getting the consent of a majority of the voters of the township. And that as the defendant could never make title to the land, he should not be permitted to collect the purchase money, which he might not be able to refund. He contended that an allegation of fraud was not necessary to sustain such a bill as the present.

He cited 4 Wheaton, 629; 2 B. Com. 317; 3 Ala. Rep. 51; 7 Cranch. 164; 9 id. 43; 4 Wheaton, 518; 1 Sumner's C. C. R. 277; 9 Porter, 577; Bl. Com. 483, note; 3 Ala. 169; Tomlin's Law Dic. Title Inhabitant.

He maintained that the mistake gave a Court of Chancery jurisdiction, and that it could only be rectified in Chancery, as the heirs of Long, one of the vendees, had an interest in it.

• • • STONE, contra.

ORMOND, J.—The plaintiffs in error purchased from the defendant, Brown, a large tract of land, composed in part of a sixteenth section, and upon which there was a mill erected—the purchase money was to be paid in three instalments, which were secured by promissory notes, the vendor executing a bond

Long & Long v. Brown et al.

with condition to make title to the land on the payment of the purchase money. The notes were transferred to the defendants, N & H. Weed & Co. who brought suit on the note first falling due, and obtained a judgment, to enjoin which this bill was filed.

The bill seeks to enjoin the collection of the purchase money, on the ground of fraudulent representations in relation to the workmanship of the mill dam—because of a mistake in the bond for title of one of the parcels of the land which was essential to the enjoyment of the residue—and because of the alleged inability of the vendor to make title.

All the allegations of fraud are distinctly and positively denied in the answer, and it is insisted that the plaintiffs purchased with full knowledge of all the facts—that in regard to the mistake in the title bond, the defendant, Brown, never knew of it until the filing of the bill, and is now, and would at all times have been willing to correct it—that as it respects the title to the land, he believes that he will be able to make a good and sufficient title according to his contract—or will be able to respond in damages.

The bill states that the plaintiff in error sold one half of his interest in the land to one William F. Long, and made an indorsement to that effect on the bond for title, and it is now contended that as William F. Long has died, his heirs have such an interest in the bond, that the mistake can only be corrected in a Court of Chancery. Mistake is one of the heads of Chancery jurisdiction, and there can be no doubt that a Court of Equity would rectify the mistake in this case; but there is neither reason or propriety in seeking the expensive aid of that Court, to do that which the vendor was willing to do voluntarily. To give a Court of Equity jurisdiction to enjoin a judgment at law, until a mistake of this kind could be rectified application should have been made to the vendor to make it, and on his refusal, that Court would interfere, if necessary, to prevent an injury from that cause. No application for its correction was made in this case, or information given that the mistake existed. There was therefore no reason either for granting, or continuing the injunction for that cause.

If it be true as stated, that minors are interested in this title bond, it is not easy to see how they could be prejudiced by

the correction of a mistake. A decisive answer, however, to the objection that the mistake could not be corrected without the interposition of a Court of Equity is, that it is a question in which the minors alone have an interest, and they could not be prejudiced by such a course, as they would not be concluded by the alteration, if fraudulently or improperly made by the adult parties to the contract.

In respect to the allegations of the bill of the inability of the vendor to make titles to the land, it is to be observed that a Court of Equity will not interfere between the parties to a contract, although it be executory, where no fraud has intervened, but will leave them to seek that redress for its violation which, by their contract they have stipulated for, unless there exists some special ground for the interposition of a Court of Equity. Thus, Chancery will interpose where the covenants entered into by the parties are independent, and the vendor cannot make or obtain the title, and is *insolvent*. The ground of its interposition in such a case, is to prevent the irreparable injury which would result from the payment of the purchase money, to one who could not respond in damages for the breach of the contract on his part.

The allegations of this bill fall far short of these requisitions. The question as to the ability of the vendor to make title to the sixteenth section will be hereafter considered, and in regard to the other portions of the tract, it is not sufficiently alledged that the vendor cannot make the title, or that failing in that he is unable to respond in damages. The allegation is, that they (the complainants,) "have reason to fear, and do fear, that said Warner Brown is and will be wholly unable to make them title according to his contract, and they also fear he will be unable to respond to them in damages." Allegations of this loose and indeterminate character, are wholly insufficient to warrant the interposition of Chancery. There is no sufficient allegation of the insolvency of the vendor, and the allegations of the inability of the vendor to make or procure the title, are too loose, vague and uncertain to be the basis of any action in a Court of Chancery. So far as they are susceptible of being answered they are all denied.

In relation to the sixteenth section, which constitutes a considerable portion of the land purchased, it is supposed that the

vendor never can make a good title; because, first, there was no power to sell the land, existing either in the Legislature or in the township, and that the sale was therefore a nullity; and, secondly, if such power existed it was improperly exercised, as the act of the Legislature did not require the assent of all the *inhabitants* of the township.

From the vast number of sales which have been made under the sanction of this law, this question is invested with great interest, and has received our deliberate consideration.

The propriety of reserving a portion of the public land, out of the extensive domain from which new States were in future to be created, as the means of providing a perpetual fund for the purpose of education, early received the attention of our wisest statesman. The first time they were called to legislate upon the lands ceded by the States, was in the establishment of the "Ordinance for the government of the territory of the U. States north west of the river Ohio, in 1787. They declared by the third article of that celebrated instrument, that "*Religion, morality and knowledge, being necessary to good government, and the happiness of mankind, schools and the means of education shall be forever encouraged.*" At the same time, whilst authorizing the Treasury to contract for the sale of the western lands, they required the lot No. 16, in each township to be given in perpetuity for the purposes contained in the Ordinance. [1 vol. Land Laws, 361, 362.]

By the fifth clause of the first article of "The Articles of Agreement and Cession between the U. States and Georgia," in 1802, by which the United States acquired the right to the territory now composing the States of Alabama and Mississippi, it was declared that the territory thus ceded should, when sufficiently populous, form a State, and be admitted into the Union "with the same privileges and in the same manner as is provided in the ordinance of Congress of 13th July, 1787, which ordinance shall in all its parts extend to the territory contained in the present act of cession, that article only excepted which forbids slavery.

The act of Congress of 2d March, 1819, for the admission of Alabama into the Union, declares, "that the section numbered sixteen in every township, and when such section has been sold, granted or disposed of, other lands equivalent thereto,

and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools.”

This grant by Congress cannot properly be called a donation; it was the performance merely of a solemn obligation created by the compact with Georgia, and was intended as a grant to the State, to be held in perpetuity for the use and benefit of the inhabitants of the township. The legal title to these lands, could not vest in the inhabitants of the township, as they had no corporate existence, nor could such a capacity be conferred on them by the act of Congress; and it is very certain was not intended to be conferred. Nor can any doubt be entertained that the legal title was intended to be vested by the act of Congress in this State, and did so vest, by the acceptance of the conditions proposed by the act of 2d March, 1819, by the convention of this State, in August of the same year.

By the acceptance of this trust, the State impliedly stipulated to do those acts which were necessary to give full effect to the grant, and this trust it has faithfully executed. As early as 1819 agents were appointed to take care of the lands, and subsequently school commissioners were appointed, and trustees required to be elected by the township for the management of the sixteenth section in each township, who were declared a body corporate.

As the land in its wild state was of no benefit to the people of the township, and as a revenue could only be derived from it by cultivation, the lands were leased under suitable provisions to preserve them from waste. It was soon, however, discovered that this process would end in the destruction of the land; every where the sixteenth section was in a state of ruinous dilapidation. In this condition of things, application was made to Congress, by the Legislature of this State, for leave to authorize the sale of the sixteenth section, by the assent of the township, which was granted—the proceeds of the sale to be invested in some productive fund.

We agree entirely with the counsel for the plaintiff in error, that this act conferred no power; nor had Congress any right whatever to interfere in the matter. It is, however, evidence of the strong desire of the Legislature to act in good faith, and to keep within the pale of the law. Having thus obtained the assent of Congress, the Legislature passed an act authorizing

the sale of the sixteenth section in each township, with the *assent of the inhabitants*, the proceeds to be placed in one of the Banks of the State, and to carry interest at the rate of six per cent per annum, payable quarterly, and secured to the people of the township whose lands were thus sold.

It is very clear that power must exist somewhere to control the subject of the grant, so as to make it subserve the purpose it was designed for. The State very properly supposed that this power was lodged with the inhabitants of the respective townships; a majority were therefore authorized to act, and if in their opinion a sale of the land was advisable, to make sale thereof. The whole scope and design of the law is merely to give the assent of the State to such sale, and by providing the necessary machinery to carry out in action the wishes of the township, and at the same time afford the inhabitants a guaranty, that the principal of the proceeds of such sale should be forever kept inviolate, for the benefit of posterity, and the annual interest only be consumed by the existing generation.

The act authorizing these sales, passed in 1828, requires the assent of the inhabitants of the township to such sale, to be ascertained by taking the vote of the qualified electors resident in the township, a majority of whom voting in the affirmative was necessary to a sale. It is denied by the counsel for the plaintiff in error, that the assent of a majority of the *electors*, of the township, is the assent of a majority of the *inhabitants*, which term he insists means householders, and includes females as well as males. [Tomlin's Law Dic. Title, Inhabitant.]

The popular meaning of the term *inhabitant* is, a resident or dweller in a place, in opposition to a mere sojourner or transient person. [1 Bouv. Law Dic. 504; Webster's Dic.] and such, beyond all doubt, was the meaning of the act of Congress. In this sense then, the aggregate mass of the people, men, women and children, *resident* in the township are the *inhabitants* to whom this grant is made in perpetuity. How then is the land to be sold and converted into money, if it becomes obvious that a sale is necessary to prevent the destruction of the fund; must the assent of every one of the inhabitants be obtained, as a prerequisite; or may not the assent of a majority of those to whom, from their sex and age, the politi-

cal interests of the country are confided, be considered as a fair exponent of the wishes of a majority of all the *inhabitants*? We are of that opinion; to obtain the assent of all, or even the opinion of all, would be impracticable.

It is the established law, that in the case of a corporation aggregate, the opinion of a majority binds the whole, and it is quite obvious, from the diversified opinions of men on all subjects, that in all matters in which the entire mass are interested, the majority must govern the minority; and were it otherwise, civil government would be at an end. From the necessity of the case, therefore, a majority of the inhabitants must be permitted to act for all; and we think the Legislature acted wisely in considering that the consent of all the inhabitants might be fairly implied from the consent of a majority of the qualified electors, as it is impossible to suppose that the interest of a majority of the qualified electors of any township, is not identical with the interest of a majority of the *inhabitants* of the same township.

We are therefore clearly of opinion, that the grant of sixteenth sections is in perpetuity to the inhabitants of the respective townships—that the legal title to the land is in the State, in trust for the inhabitants of the respective townships, in which the land is situated—and that a sale of the land, pursuant to the act of the Legislature is valid and binding on the inhabitants of the township.

We are not called on in this case, to determine whether the sale of the sixteenth section in this instance was regular; or if irregular, whether such defect was not waived by the township if it acquiesced therein, and received the interest of the proceeds of the sale—or, lastly, whether all inquiry into the regularity of the sale would not be concluded by the issuance of the patent.

It was not improper to entertain the motion to dissolve the injunction, on the answer of Brown alone, as there is no allegation in the bill that the other defendants have any knowledge whatever of the facts constituting the supposed equity of the bill, and, indeed, the contrary is shown by the bill itself.

Nor did the Court err in refusing permission to the plaintiff in error to read affidavits in support of the bill. It is perfectly well settled, both in England and this country, that, upon a

Jones and Connor v. Jemison and Stewart.

motion to dissolve an injunction, affidavits cannot be received, either to support or contradict the answer, with the single exception of *waste*, where the injury would be irreparable. All other cases are provided for in this State by the bond of the defendant, which will be a sufficient guaranty. [8 Vesey, Jr. 35; 1 John. Ch. 211, 444; 2 id. 202.]

Let the decree of the Chancellor dissolving the injunction be affirmed.

JONES AND CONNER v. JEMISON AND STEWART.

1. The County Court, on the final settlement of an estate, has no jurisdiction to render judgment against any person but the representatives of the estate to be settled.

WRIT of Error to the County Court of Pickens.

The transcript certified to this Court with the writ of error, states the proceedings of the County Court with respect to this case in the following manner:

“On the final settlement with Robert Jemison, Jr. and Charles Stewart, as executors of the last will and testament of Wm. Booker, deceased, Aurelius N. Jones and Wm. F. Connor, executors of the last will and testament of Sarah N. Booker, being present. And the matters of the settlement having been referred to George B. Saunders, as auditor, and the accounts and vouchers examined by the Court, it appears that the debts against the estate and legacies have been satisfied, as described by the will of the said William N. Booker, deceased, by his said executors, as appears by the account current and vouchers filed. And it further appears that there is in the hands of the said Aurelius N. Jones and William F. Connor, as executors of the last will and testament of Sarah N. Booker, deceased, the sum

Jones and Connor v. Jemison and Stewart.

of \$4,101, due to the said Robert Jemison, Jr. and Charles Stewart, as guardians of the estate of Edith M. Booker, a minor, and legatee in the will of the said William N. Booker, deceased. Ordered, therefore, that Robert Jemison, Jr. and Chas. Stewart, as guardians of Edith M. Booker, recover of Aurelius N. Jones and William F. Connor, executors of the last will and testament of Sarah N. Booker, the said sum of \$4101 61. It further appears that the said Aurelius N. Jones and William F. Connor, are indebted to the said Robert Jemison Jr. and Chas. Stewart in the sum of \$720 37, for an allowance made by this Court to compensate them for their services as executors aforesaid. Therefore, ordered and decreed that the said Robert Jemison, Jr. and Charles Stewart, recover of the said Jones and Connor, executors of Sarah N. Booker, deceased, the said sum of \$720 37. It further appears that the said Jones and Connor, executors as aforesaid, are indebted to the said Jemison and Stewart, executors as aforesaid, in the sum of \$1,614 77, for money by them advanced of their own funds, in the management of the estate of the said William N. Booker, deceased, as executors. Therefore, ordered that the said Jemison and Stewart, recover of the said Jones and Connor, executors of the last will and testament of Sarah N. Booker, the aforesaid sum of \$1,614 77. Ordered that executions issue for the aforesaid several sums of money.

No further proceedings whatever appear in the record of the cause.

To reverse this judgment the defendants thereto now prosecute their writ of error, and assign that the County Court erred in making it.

J. B. CLARK, for the plaintiffs in error.

COCHRAN, contra.

GOLDTHWAITE, J.—There is some difficulty in coming to the belief that the transcript certified to this Court contains the entire proceedings had in the Court below, but as no effort has been made to correct it, or to supply any deficient matter, we must act on it as we find it.

It seems then, that at a settlement of the estate of William N. Booker, deceased, of whose will Jemison and Stewart are the

Perkins v. Windham.

executors, Jones and Connor, the executors of the last will of Sarah N. Booker, were present. In the course of the settlement it appeared that Jones and Connor, as the executors of Mrs. Booker, were ascertained to be indebted to Jemison and Stewart in the manner and for the sums indicated by the judgment rendered. Conceding the indebtedness to exist from Jones and Connor, as the executors of Mrs. Booker, to the ward of Jemison and Stewart, or to themselves, as the executors of William N. Booker, this furnished no warrant for the judgment rendered against the plaintiffs in this Court. The Court had no jurisdiction to render judgment against any one, on the application for the settlement of the estate before it, except the executors themselves; and they having shown a payment of all the debts and legacies, were entitled to be discharged; but they were not authorized to use that form of proceeding to obtain judgment against the executors of the estate of Mrs. Booker.

The judgment is clearly irregular, and is therefore reversed.

PERKINS v. WINDHAM.

1. The act of 1806, makes a legatee a competent witness to establish a will by declaring his legacy to be void.
2. A devise to a parent for life, and afterwards to his or her children, is not avoided as it respects the parent, by the children proving the will as subscribing witnesses; though the latter cannot claim their residuary interest under the will.

WRIT of Error to the Orphans Court of Pickens.

The defendant in error propounded for probate, to the Orphans Court, a paper purporting to be the last will and testament of Rachel Windham, deceased; in which he is designated an executor. This paper was admitted to probate upon the evidence of Hugh Windham, Nicholas L. Windham and

Perkins v. Windham.

John M. Massingill, although it appeared that they were grandchildren of the testatrix ; and to the father of the two first, and the mother of the latter, were devised real and personal estate of great value, to be enjoyed by the devisees during life, and thereafter to be divided equally between their children. The contestant objected to the competency of the witnesses to the will, and his objection was overruled and is duly certified by bill of exceptions.

PECK & CLARK, for the plaintiff in error. The witnesses to the will were all interested in its establishment ; for thereby the share of the father of two and the mother of one in the estate would be increased, and they eventually benefitted. [7 Com. Law. Rep. 199 ; 7 Cow. Rep. 64 ; 1 Mass. Rep. 238-9.]

J. B. CLARK, for the defendant, cited Aik. Dig. Tit. Wills, §8 ; 3 Starkie's Ev. 1690-1, and note ; 1 Johns. Cases, 163 ; 4 Johns. Rep. 311. Conceding that the witnesses have a direct interest in establishing the will, and yet the statute expressly makes them competent, and declares that they shall forfeit all interest under the will.

COLLIER, C. J.—Assuming that the interest of the attesting witnesses is, under the will, so direct as to render them incompetent, according to the rules of the common law, we will inquire what influence the statute exerts on their competency. The act of 1806 enacts, that “ If any person shall be a subscribing witness to a will, wherein any devise or bequest is made to such subscribing witness, and the will cannot be otherwise proved, the devise or bequest to such witness shall be void, and he or she compellable to appear and give testimony on the residue of the will, in like manner as if no devise or bequest had been made. But if such witness would have been entitled to any share of the testator's estate, in case the will was established, then so much of such share shall be saved to such witness as shall not exceed the value of the said devise and bequest made to him or her in the said will.” [Aik. Dig. 449.] So far as it is material to consider this enactment, it is substantially the same as the 25th Geo. 2, c. 6. That statute like our

Perkins v. Windham.

own, expressly declares, that every devise or bequest to a person attesting the execution of a will, shall be utterly null and void; and such person shall be admitted as a witness to establish the same. The passage of that act was induced by the doubts which were entertained, whether the competency of such an interested person could be restored by a release, payment, or extinguishment of all his interest, so as to admit him to prove the execution of the will. Our statutes restores the competency of the attesting witness by extinguishing all interest which he would otherwise take under the will, whenever his testimony is necessary to establish it.

The meaning of the words, "give testimony on the residue of the will," is, that the evidence of the witness shall be competent to prove its execution so far as he is not a beneficiary of the testator's bounty. In the case before us, neither of the witnesses take an interest to vest in possession immediately upon the testator's death; but its enjoyment is postponed until the death of their respective parents, who are devisees and legatees. This will confers upon them an interest *in præsenti*, to be enjoyed *in futuro*; and its forfeiture by the statute cannot affect the interests of those whom the witnesses are to succeed.

The record sufficiently establishes the examination of the attesting witnesses, to prevent them from coming in for a share in the remainder, after the death of their parents—the statute which has been cited, divests them of all interest *under the will*; and as a necessary consequence the order of the Orphans Court is affirmed.

THE COMMERCIAL BANK OF COLUMBUS v. WHITE- HEAD.

1. The maker of a promissory note is not a competent witness for the defendant who had indorsed it for his accommodation, in a suit by the holder against such indorser, without a release for the costs of the suit.
2. A deposition taken upon an affidavit that the witness is about to leave the State cannot be read on the trial of the cause if the witness does not carry his purpose into effect but remains within the State.

ERROR to the Circuit Court of Greene.

This was an action of assumpsit, by the plaintiff in error as indorsee, against the defendant in error as indorser of a promissory note made by Joseph B. Earle, for twenty-one thousand seven hundred and eighty-one dollars and seventy-seven cents.

From a bill of exceptions taken at the trial of the cause, it appears that the defendant offered to read as evidence the deposition of Joseph B. Earle, which had been regularly taken before the last continuance of the cause, upon the affidavit of the defendant, that the said Earle was about to remove from the State of Alabama. It was proved, that at the taking of the deposition Earle resided, and has ever since resided, on his plantation, in the county of Marengo, about seventy-five miles from the place of the trial of the cause; that he has not removed from thence, but was, at the time of the trial of this cause, absent from home on a temporary visit to the city of Mobile, which is distant more than one hundred miles from the place of trial. That the indorsement of the bill of exchange by the defendant on which he is sought to be charged in this suit, was made by him for the accommodation of the said Earle.

The plaintiff objected to the reading of the deposition—first, on the ground of interest in the witness; and, secondly, because the statute did not authorize the deposition to be read under the facts proved. But the Court overruled the objection and permitted the deposition to be read in evidence to the jury—to

The Commercial Bank of Columbus v. Whitehead.

which the plaintiff objected ; and the jury having found a verdict for the defendant, judgment was rendered accordingly—from which this writ is prosecuted.

The plaintiff assigns for error the matters of law arising out of the bill of exceptions.

BLISS and THORNTON, for the plaintiff in error, contended that as Whitehead, the defendant, was an accommodation indorser merely, he could recover of the maker, not only the damages which might be recovered in an action by the holder of the note, but also the costs. That therefore, the maker, unless released, had a direct interest in the suit, and was an incompetent witness. To this point they cited 4 Taunton, 464 ; 14 East 565 ; Chitty on Bills, 414, 7 Am. ed ; 1 Cowen Phillips on Ev. 59, 60, 61 ; 2 id. notes 105, 107 ; 2 Starkie on Ev. 300 ; Greenleaf on Ev. 447 ; 2 Saunder's P. and Ev. 942 ; 3 Chitty's Gen. Prac. 814 ; 9 Serg. and Rawle, 236 ; 16 Johns. 70 ; 14 Mass. 303 ; 7 Cranch, 206 ; 5 Munroe, 269 ; 1 Rep. Con. Court S. C. 423 ; 1 McCord, 552 ; 5 Cowen, 153 ; 2 Hill, 131.

To show that the deposition could not be received as evidence under the statute, they cited 9 Porter, 650 ; 1 Ala. Rep. 237.

PECK and MURPHY, contra, maintained that it did not appear from the bill of exceptions, with sufficient certainty, that the witness whose testimony was excepted to, was the maker of the note, and to this point they cited 8 Porter, 360.

That if the witness was competent for any purpose, the Court did not err in refusing to exclude the deposition generally ; and they insisted that in a suit against an accommodation indorser the maker was competent—

First—To prove that the date of the note had been altered. [4 Cowen Phillips on Ev. 32.]

Second—To prove any matter of defence which arose after the execution of the note. [17 Mass. 95.]

Third—To prove that the plaintiff was a *mala fide* holder. [15 Johns. 270 ; 18 id. 167 ; 3 Wendell, 415.]

Fourth—To prove the payment of a contract with the hold-

er, giving day of payment, by which the endorser would be discharged. [4 H. & Johns. 283.]

Lastly—That it had been settled by this Court, in a case like the present, that the maker was a competent witness. [9 Porter, 225.]

ORMOND, J.—A preliminary question is presented on the bill of exceptions, which it is proper to determine before proceeding to the examination of the assignments of error.

It appears from the bill of exceptions that the defendant offered to read the deposition of Joseph B. Earle, which was objected to on the ground that the witness was interested. The objection now is, that it does not appear with sufficient certainty that the witness was the maker of the note indorsed by the defendant—his interest being dependent on that circumstance.

It is thus stated: “The indorsement of the *bill of exchange* by the defendant, on which he is sought to be charged in this suit was proved to have been made by him for the accommodation of said Earle.”

We think it sufficiently appears, that the witness and the maker of the note are the same person; not merely because the names are the same, but because it is stated that the indorsement on which the defendant is sought to be charged in this suit, was made for the accommodation of the *said Earle*. It is, to be sure, not stated as lucidly as it might be, but we cannot doubt that the witness and the maker of the note are the same person. Had there been any doubt or controversy in the Court below, about the identity of the witness, it would doubtless have appeared in the bill of exceptions.

Nor is there any weight in the objection that the instrument sued on is called a *bill of exchange*, when in fact it is a promissory note. It is our daily practice to correct the phraseology of bills of exception by the context and other parts of the record. To hold that this bill of exceptions, as to this point, was void for uncertainty, would be to say that we could not apprehend that, which would be obvious to any plain man of common sense.

To proceed to the inquiry before us, was the maker of the note a competent witness for the defendant, who had indorsed it for his *accommodation*, without a release for costs?

The Commercial Bank of Columbus v. Whitehead.

It is the law of this and most of the other States of the Union, that a party to a note, is a competent witness in favor of any other party who may be sued upon the paper, upon the ground that his interest is balanced. But when a note is indorsed for the accommodation of the maker, the indorser is a surety, and if the amount is recovered against him by the holder, the maker is liable to reimburse him, not only the amount of the note and interest, but also the costs of the suit. In a suit therefore, by the holder against the accommodation indorser, the maker is not a competent witness, unless he is released from liability for the costs. This rule is so well settled that it is not necessary to cite authorities in its support, reference therefore is merely made to the numerous cases cited by the plaintiff's counsel.

It is, however, supposed that this Court has held otherwise, in the case of *Griffin v. Harris*, [9 Porter, 225.] That was a case where an accommodation indorsee was sued, and having *released* the maker, offered him as a witness. The primary Court rejecting him, the case was brought to this Court. It is very clear that the question of interest did not arise in this case, as the witness was released, nor does it appear that the question of the interest of the witness arising from his liability for costs was presented to the mind of the Court, as it certainly was not presented on the record. It is not therefore just criticism to apply the general remarks of the Court to a subject evidently not within its contemplation at the time, although from their generality, under other circumstances, the particular subject might be embraced by them. The whole scope of the argument is to show the competency of the witness, because his interest was precisely balanced between the holder and the indorser, an argument which could not have been urged if the question of costs had been raised or presented to the mind of the Court, unless, indeed, that question was considered as settled by the release. The probability however is, that as the question was not mooted, or indeed, presented in the case, that the difference between the attitude of the maker of a note when offered by an accommodation indorser, or an endorser for value, was not considered at all, and we certainly cannot consider it an authority on this point.

It was also urged, that although the general rule may be as stated, yet that the maker might be a witness for some purpo-

The Commercial Bank of Columbus v. Whitehead.

ses as to prove payment, or that the plaintiff was a *mala fide* holder and not entitled to recover against any one.

A witness may be competent to testify to a particular fact before the Court, who would not be competent to testify to the jury; but a witness who is offered generally, must be so for all purposes. Indeed the very instances which are put by counsel, would, if proved, defeat the action. Yet it is because the maker is interested in defeating the action, that he cannot be a witness without a release.

We are entirely satisfied that the deposition was improperly admitted, it not appearing that the witness was released previous to his being examined.

The deposition was taken upon an affidavit that the witness was about to remove from the State. It was proved that he had not removed from the State, but has ever since resided on his plantation, about seventy-five miles from the place of trial, and at the time of the trial was temporarily absent from home, on a visit to the city of Mobile.

The statute under which this deposition was taken, has been several times under consideration in this Court. The plain design of the statute was, to give to parties litigant the benefit of the testimony of witnesses who would leave the State before the trial of the cause. If the witness should change his purpose, or from any cause remain, it cannot be read, as was expressly held, in *Goodwyn v. Lloyd*, [5 Porter, 237.] This results necessarily from the declaration of the statute, that all depositions taken under it shall be "considered as taken *de bene esse*." [Aik. Dig. 127.] The design of the statute was merely to obtain the testimony of a witness not able to attend the trial from absence from the State; the cause being removed, the authority to read the deposition would be at an end. See also *McCutchen v. McCutchen*, 9 Porter, 650; and *Eddins v. Wilson*, 1 Ala. N. S. 237.

When, therefore, it was shown that the witness had not left the State but had remained at his residence, within the jurisdiction of the Court, there was no authority to read his deposition.

The Court therefore erred on both the grounds stated, and the judgment must be consequently reversed and the cause remanded.

CASTLEBERRY AND COLLINS v. FENNELL.

1. Where a bill single is described in the declaration, as made and delivered to the plaintiff, by the name and description of J. D. F. agent for G. A. K. or bearer, the suit is properly brought, and the words agent, &c. will be considered merely as *descriptio personæ*.

WRIT of Error to the Circuit Court of St. Clair.

Action of debt by Fennell against Castleberry and Collins, on a bill single, alledged to have been made and delivered to the plaintiff by the name and description of John D. Fennell, agent for G. A. Kelly.

The defendant suffered judgment to go by default, and it is entered for the proper sum, but in damages instead of debt.

The errors complained of are—

1. That the plaintiff shows the legal interest in the debt is in another.
2. That judgment is given for more damages than are claimed by the declaration.

MOODY, for the plaintiffs in error, cited 21 Wend. 110; 9 id. 44; 2 id. 158; 10 id. 156; 10 Johns. 387; 6 id. 94.

As to the damages, Derrick v. Jones, 1 Stew. 18; Johnson v. Kelly, 2 id. 490; id. 225, and cases there cited.

STONE, for defendant in error.

GOLDTHWAITE, J.—If the bill single is as described in the declaration, there is nothing more clear than that the words agent, &c. after the obligees name, must be considered as merely descriptive of the person, and not as investing Kelly with any legal interest in the contract. [Buffum v. Chadwick, 8 Mass. 109.]

The question as to the manner in which the judgment is entered, was settled in this Court adversely to the plaintiffs in

The State v. McCall.

error as long ago as *Briggs v. Greenlee*, Minor 123, when it was held to be entirely immaterial whether the judgment is in debt or damages, if it be for the proper sum.

Judgment affirmed.

THE STATE v. McCALL.

1. The breaking open the shutters of a window, and protruding the hand within them, is not such an entry as will constitute the crime of burglary, if the sash remain down, and the glass are not broken, so as to permit a violation of the security of the house.
2. The constitutional provision which authorizes one charged with a crime, to be heard by himself or counsel, does not confer the right to make a statement of facts, independent of, and not warranted by, the evidence.

The defendant was indicted for burglary, at a term of the Circuit Court of Mobile, commencing on the sixth Monday after the fourth Monday in September, 1842.

The cause was tried on the plea of *not guilty*, and certain questions of law reserved, which are referred to this Court as novel and difficult. These questions are thus stated, "In this case it was proved by the State, that the supposed burglary was committed by the defendant, in the mansion house of Mrs. Ann Vincent, in the city of Mobile. That between eleven and twelve o'clock at night, Mrs. Vincent had retired, and heard a noise at the window, indicating that force was being used to open the shutters, or blinds—that the window itself was fastened down, in such a manner that it could not be opened from without—that the shutters were also fastened in the ordinary way before Mrs. V. retired—that after hearing the noise without, alarm was given to a lodger in the house, who upon going out, found the defendant in the yard, near the window, the shutters of which had been opened, and were then standing open. After the witnesses had been examined, and the argu-

ments of counsel on both sides concluded, defendant's counsel asked the Court to allow defendant to make a statement to the jury—this the Court declined. The Court then charged the jury, that if they believed from the testimony, that the defendant, by the application of force, wrested open the window shutters, and his hands protruded beyond the line made by the shutters when shut, that that in law, was an entry, notwithstanding the sash remained down and the glass was unbroken."

"The prisoner was found guilty, and sentenced to imprisonment in the Penitentiary for the space of ten years.

ATTORNEY GENERAL, for the State, to show the charge of the Court to be correct, cited 2 East's P. C. 493; 2 id. 48; 1 Hale's P. C. 552; Foster's C. L. 108; 1 Hawk. P. C. 130-1-2; Russ. and R. C. C. 499.

Though the defendant had a constitutional right to be heard by himself and counsel, yet he could not be allowed to give evidence to the jury.

ROLLSTON, for the defendant. The defendant should have been allowed to make his statement to the jury. The constitution guarantees to every man the right to be heard by himself and counsel. [The State v. Hughes, 2 Ala. Rep. N. S. 102.]

It is clear upon authority, that the defendant did not make such a breach and entry into the mansion house, as to warrant his conviction of the crime of burglary. [1 Hale's P. C. 552-3; Hawk. P. C. 132, §11, 12; Roscoe's Crim. Ev. 254-8-9; Arch. Crim. Plead. 291-3.]

COLLIER, C. J.—The crime of burglary may be defined to be, the breaking and entering a dwelling house in the night time, with intent to commit a felony. For the purposes of this offence, it is said the term "dwelling house," comprehends all buildings within the curtilage or inclosure, &c. [1 Hale's P. C. 358, 559; Hawk. P. C. Ch. 38, §12; East's P. C. 492; id. 493, 501, 508.] The offence consists then in violating the common security of the dwelling house in the night time, for the purpose of committing a felony. [Commonwealth v. Ste-

phenson et al, 8 Pick. Rep. 354.] But what is a violation, is not in all cases entirely clear; the authorities discovering a great want of harmony. It is not our purpose now, to notice the many adjudications with which the books abound; but only to consider a few of those most pertinent to the case in hand, and then state the principle which must control our decision.

In *Rex v. Bailey* and another, [Russ. and R. C. C. 341,] it appeared that a sash window belonging to a dwelling house, was fastened in the usual way, by a latch, from the bottom of of the upper sash to the top of the lower one; and that there were inside shutters, which were fastened. One of the prisoners broke a pane of glass in the upper sash of the window, and introduced his hand within, with the intention to undo the latch by which the window was fastened. While he was cutting a hole in the shutter with a centre bit, and before he had undone the latch of the window, he was seized. All the Judges were of opinion, that the introduction of the hand between the window and the shutter to undo the window latch, was a sufficient entry to constitute a burglary.

In *Rex v. Rust and Ford*, [1 Moody's C. C. 183,] the facts were these: the glass sash window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the shutters themselves were about an inch thick. It appeared that after the sash was thrown up, a crow-bar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found on the inside of the shutters. The Judges were of opinion that this was not a case of burglary, as it did not appear whether any part of the hand was within the window, although the aperture was large enough to admit it.

Any, the least entry, is sufficient by means of the hand, or foot, or even by an instrument with which it is intended to commit a felony. [East's P. C. 490; Foster's C. L. 107; 1 Hawk. P. C. Ch. 38, §7; 1 Hale's P. C. 555.] But the entry, it is said, must appear to have been made with the immediate intent to *commit a felony*, as distinguished from the previous intent to *procure admission* to the dwelling house. Where it

appeared that a centre-bit had penetrated through the door, from chips found in the inside of the house, yet as the instrument had been introduced for the purpose of breaking, and not for the purpose of taking the property or committing any other felony, it was held the entry was incomplete. [1 Leach's C. L. 452; East's P. C. 491.]

The citations from the crown cases, it must be admitted, lend their support to the charge of the Circuit Judge to the jury. The only difference being, that there was a breach and entry of the sash, while here, the breach and entry was of the blinds, which were the outer protection. This, it is conceived, cannot require the application of a different principle. It cannot be, that the common security of the dwelling house is violated by breaking one of the shutters of a door or window which has several. True, it weakens the security which the mansion is supposed to afford, and renders the breach more easy; but as additional force will be necessary before an entry can be effected, there can, under such circumstances, be no burglary committed.

Suppose the shutter of a door made by placing plank upon each other until it is two or three double, if the thickness of one of the plank be removed by one intending to commit a burglary, and an entry thus far made, can it be said that the offence was completed? What, in point of principle, is the difference between such a case, and one where there are several shutters, an inch or two apart from each other. In neither case can such an entry be made as will enable the aggressor to commit a felony. In such cases the entry may be said to be made with the intent rather to *procure admission into the dwelling house*, than to *commit a felony*, which we have seen is an indispensable constituent of the crime of burglary.

To constitute burglary, an entry must be made into the house with the hand, foot, or an instrument with which it is intended to commit a felony. In the present case there was nothing but a breach of the blinds, and no entry beyond the sash window. The threshold of the window had not been passed, so as to have enabled the defendant to consummate a felonious intention; and according to the principle we have laid down, the charge to the jury was erroneous.

The constitution guarantees to every one charged with the

Collins v. Fowler.

commission of a crime, the right to be heard by himself and counsel, but it does not permit the accused to make a statement of facts to the jury, unless it be authorized by the evidence adduced. Here the reasonable inference perhaps is, that the statement proposed to be made was not in the course of a legal defence; at any rate the leave of the Court was not asked for that purpose, until, according to the regular course of procedure, the arguments for the State and the prisoner had been concluded. Taking this to be true, the Court might very well have refused to allow the defendant to make the statement he desired.

For the error in the first question considered, the judgment is reversed, and the defendant is directed to remain in custody to await a trial *de novo*, unless in the *interim* he be discharged by due course of law.

COLLINS v. FOWLER.

1. A deposition cannot be read which the Commissioner certified was taken on the second day of November, the commission requiring it to be taken on the first day of November. Nor will the defect be aided by the proof of a witness that he received the deposition on the first day of November, but did not know when it was taken.
2. The reasonableness of the charge of a physician cannot be established by a witness proving what the same physician had charged him in a similar case.

ERROR to the Circuit Court of Dallas.

Assumpsit by the defendant against the plaintiff in error.

On the trial it appeared that the action was brought by the defendant for services rendered to the daughter-in-law of the plaintiff, at her request.

The plaintiff offered the deposition of a witness, which pro-

Collins v. Fowler.

ved that he resided in the family of Dr. Fowler, and that a note bearing the signature of the defendant was brought by one of her servants, desiring Dr. Fowler to attend Mrs. Collins, her daughter-in-law, who was sick at her house. That the Doctor was then from home, but on his return the note was handed to him, and the witness and Dr. Fowler went to the house of Mrs. Collins, to see the patient, when Mrs. Collins stated that she had written a note the day previous desiring his attendance. Appended to the deposition was a note purporting to be signed by Mrs. Collins, of the tenor above stated.

Another witness proved the note to be in the hand-writing of Mrs. Collins.

The defendants counsel objected to so much of the deposition as related to the note attached to the deposition, but the Court overruled the objection.

The plaintiff also offered to read the deposition of another witness, appended to which was a notice in writing, that the deposition would be taken at a place designated, on the first day of November—the certificate of the commissioner stated that it was taken on the *second* day of November. A witness stated that he received the deposition from the commissioner on the first day of November, but did not know when it was taken. The defendant objected to the reading of the deposition to the jury, but the Court overruled the objection and it was read to the jury.

A witness was also introduced, who proved the plaintiff's rate of charging for professional services rendered to him, but did not know what he charged others. This was also objected to by the defendant—but the objection overruled.

The plaintiff obtained a verdict and judgment, from which this writ is prosecuted. The errors assigned are the matters of law arising on the bill of exceptions.

EDWARDS, for the plaintiff in error.

R. SAFFOLD, contra.

ORMOND, J.—We are of opinion that the jury might have inferred, that the letter appended to the deposition was the one spoken of by the witness. The question, however, is entirely unimportant, as the same fact was proved not only by the ad-

mission of the defendant, but by proof that the note was in her hand-writing.

The certificate of a commissioner authorized to take a deposition, setting forth the time and place and circumstances under which it is taken, is *prima facie* evidence of the facts therein stated.

The certificate in this case showed that the deposition was not taken on the day the opposite party was notified to appear, and as she did not attend and cross examine, there was no authority for reading it as evidence. To surmount this objection a witness was introduced who proved that he received the deposition from the commissioner on the *first* day of November, but did not know when the deposition was in fact taken.

This testimony shows that it was not taken on the *second* of November, but it does not prove that it was taken on the first. There was therefore no proof when it was taken, and for that cause it should have been rejected.

There was also error in permitting the witness, Soles, to testify to the charges for professional services made by the plaintiff against him. The object was doubtless to show that the charge made in this case, was what was usual and customary for physicians to charge for services in like cases. But this could not be established by proving what the plaintiff had charged another person, as the question would still return, whether that charge was reasonable, and according to the usage and practice of physicians in the neighborhood.

The judgment must therefore be reversed and the cause remanded.

HARRELL ET AL V. MARTIN, PLEASANTS & Co.

1. A writ of execution should be made returnable to the term of the Court next succeeding its *teste* when issued more than fifteen days previous to the return day of the next succeeding term; but if issued when there is a less number of days, it should then be made returnable to the next succeeding term thereafter.

WRIT of Error to the Circuit Court of Madison.

This was a motion to quash a writ of *fi. fa.* sued out by Martin, Pleasants & Co. against Harrell and Jarman, on the 23d September, 1841, and made returnable to the Court to be held on the 4th Monday of April then next. The Court refused to quash the writ, and the defendants in execution prosecute this writ of error, and assign the refusal as a cause for reversal.

MOORE, for the plaintiffs in error, insisted that the execution was irregular, as it should have been made returnable to the next succeeding term, which by law was the fourth Monday of October, instead of April, and cited Digest, 257, §1.

GOLDTHWAITE, J.—The only statute that prescribes when and how executions shall be made returnable was passed in 1807. This directs that executions “shall be made returnable to the first day of the next succeeding term, so that there be always at least fifteen days between the *teste* and return of each of said writs. *Provided*, That if the plaintiff shall desire an execution to issue returnable at a farther day, the Clerk shall issue the same accordingly, so as the day of such return be upon a Court day, within ninety days next after the *teste* thereof.” [Dig. 257, §1.]

The provisions of this enactment are sufficiently clear until we come to the *proviso*, which is controlled by the term *Court day*, and of which it is necessary to ascertain the meaning before we can arrive at the intention of the act. So far as our

statutes then existed they furnish no clue whatever to the meaning of this term, because our Court days were at intervals of more than ninety days from each other. We must then look elsewhere for its exposition; and this is found in the Virginia act of assembly of 1793, [1 Statutes at Large, N. S. 208,] from which this section of our statute is evidently copied, as it is the same, word for word, with the first section of that act. In that State the term *Court day* is perfectly well understood, and is to be found in many of the older statutes. By another act, passed in 1748, [5 Henning's Statutes at Large, 490,] the County Courts are directed to be constantly held upon days stated in the act, once in each month, and the act of 1794, [1 Statutes at Large, N. S. 310,] prescribes the same rule.

In Virginia, then, this *proviso* is perfectly operative, but here it can have no effect whatever, as we have no such Court days as the *proviso* refers to. It must therefore be rejected, as there is nothing of a similar description in our legislation which can give meaning to the term.

The section standing without the *proviso*, cannot be misunderstood—the execution must be returnable to the next succeeding term of the Court, if there are fifteen days between the *teste* of the writ and the return day of the next succeeding term. But if there is less than that number of days between the time of suing out the writ and the return day of the next succeeding term, then it can be made returnable to the next succeeding term thereafter. This results from the fact that there must always be at least fifteen days between the *teste* and the return day of an execution, and from the other circumstance that there can be no time when the plaintiff is not entitled to sue out some sort of execution if the judgment is alive and operative. Here the execution was sued out on the 23d day of September, when the next succeeding term was, by law, appointed for the fourth Monday in October. More than fifteen days consequently intervened between the *teste* of the execution and the next succeeding term. The execution, however is returnable to the fourth Monday in April, and therefore is irregular, and should have been quashed.

Judgment reversed and cause remanded.

CUNNINGHAM v. THE ALABAMA LIFE INSURANCE AND TRUST COMPANY.

1. Where the charter of a corporation authorized to lend money, enacts that certificates of stock shall be assignable on the books of the corporation, under such regulations as the Board of Trustees shall establish, it is competent for the trustees to declare by a by-law, that "No stockholder shall be permitted to transfer his stock of the Company while he is in default."
2. An indebtedness by note comes within the prohibition of a general by-law, which declares that stock shall not be transferred so long as the holder is indebted to the Company.

WRIT of Error to the Circuit Court of Mobile.

The facts of this case were agreed by the parties, and are substantially as follows, viz :

C. C. Hazard being the proprietor of fifty shares of the stock of the Alabama Life Insurance and Trust Company, on which forty dollars per share had been paid, on the 28th July, 1841, transferred the same to John B. Toulmin, who received from the Company a certificate of stock reciting the transaction, and stating that the stock was "transferable at the office of the Company, personally or by attorney." It further appears, that the plaintiff had purchased from Toulmin this stock, for a valuable consideration, and without notice of any incumbrance, and upon a production of the certificate applied to the Company, under a power of attorney from Toulmin, to cause a transfer upon its books, and to give him a new certificate in his own name. The Company refused to allow the transfer, because it holds a note made by a firm composed of Messrs. Hazard, Toulmin and one Daniel Fowler, jr. for \$5,406 08, upon which there is a balance due the Company of \$1,710, and interest. The Company refused to effectuate the contract between Toulmin and the plaintiff, for the reason that a by-law was adopted on the 18th January, 1841, which gave the Company a lien on the stock for the security of the debt due it by Toulmin and others. That by-law is as follows : "No stockholder

Cunningham v. The Alabama Life Insurance and Trust Co.

shall be permitted to transfer his stock of the Company while he is in default."

It was agreed that should the Court be of opinion that the Company was liable, that judgment may be entered for the plaintiff for the sum of two thousand and eighty dollars and the costs; otherwise for the defendants, which judgment may be discharged on the payment of the dividends accruing on the said stock since the first day of June, 1842, and a delivery to the plaintiff of a certificate of stock on demand.

Judgment was rendered in favor of the defendant and against the plaintiff for costs.

CAMPBELL, for the plaintiff in error.

STEWART, for the defendant. The by-law creates a lien in favor of the Company. Toulmin acquired his stock after this by-law was passed—it was subject to its influence before it was transferred to him; and no action can be sustained for the refusal to recognize the plaintiff's right. [4 Burr. Rep. 2219.]

The seventeenth section of the charter of the Company clearly confers the power to enact such a by-law as that relied on; and this section requires the transfer to be made on its books. All persons contracting in reference to the stock of the Company, are charged with a notice of the terms of the charter; and the plaintiff in the present case by his purchase from Toulmin acquired only an equity subject to all the equities of the Company. [3 Conn. Rep. 544; 6 id. 522.]

But if the power to enact by-laws is not conferred by the charter, it may be claimed as an incidental right; especially where it is not opposed to policy, or the law of the country. [7 Viner's Ab. 125-6-7; 1 Bacon's Ab. 444; Angell & Ames on Corp. 177, 186, 197; 1 Strange's Rep. 645; 2 P. Wm's. Rep. 207; 3 Burr. Rep. 1838; 4 id. 2221; 5 Serg. and R. Rep. 73; 8 id. 73.]

In Pennsylvania, it has been held, that a mere custom independent of a by-law, would give a lien. [8 Serg. and R. Rep. 73.] Public policy, instead of being thwarted by the by-law in question, is really promoted, as it sustains the Company, by affording increased means to pay its liabilities. The acts of the

Cunningham v. The Alabama Life Insurance and Trust Co.

corporation are obligatory upon its members, whether they were assented to by all or not—if its legislative power enacts a law within the scope of its powers, all are bound by it.

COLLIER, C. J.—The questions in this case are—1. Is the by-law enacted by the defendant, which inhibits a stockholder from transferring his stock, while he is indebted to the company, within the scope of its legislative powers? 2. Does the indebtedness of Toulmin come within the prohibition of that by-law.

1. It is said to be essential to the validity of a by law, that it should conform to the constitution of the United States and the acts of Congress pursuant thereto, to the constitution and statutes of the State in which it is located, and to the general principles and policy of the common law as it is there acknowledged. [Ang. and Ames on Corp. 182, *et post*. Hence it is held, that it must be reasonable, and while it may regulate trade it must not restrict it, so as injuriously to affect the interest of those who are not corporators. [Id. 193-8.]

The common law annexes to a corporation certain incidental rights, among which are enumerated by-laws, as private statutes for its government. [Ang. and Ames on Corp. 58; Kyd on Corp. 69.] But it has been said, where the charter expressly declares the power of the Company to make by-laws in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified; all others being impliedly excluded. [Ang. and Ames on Corp. 177.]

In Sargent et al v. The Franklin Insurance Co. [8 Pick. Rep. 90,] the Court held, that the Company had no implied lien on the shares of the stockholders, as a security for its demands against them; that it was bound to enter on its books a transfer of shares, in pursuance of an assignment; and that it was liable in damages to the assignees of the shares for refusing to do so. [See also Bates v. The New York Insurance Co. 3 Johns. Cases, 238.] But if the charter provides, that all the debts due the Company from a stockholder, shall be paid before any transfer shall be made of stock, this would prevent the assignee from demanding an assignment before the lien of the Company was satisfied. [Union Bank of Georgetown v. Laird, 2 Wheat. Rep. 390.] By the charter of the Hudson's

Cunningham v. The Alabama Life Insurance and Trust Co.

Bay Company, the corporation were "empowered to make by-laws for the better government of the Company, and for the management and direction of their trade to Hudson's Bay." Accordingly they made a by law, that if a member should be indebted to the Company, his stock in the Company should be in the first place liable to the debts which such member should owe the Company; and that the Company might seize and detain his stock for the debts due to them. It was objected to this by-law, that the stock of the Company should not be liable to the payment of any one debt in preference to another; for all debts ought to be paid according to the course of law, and no by-law could be made to the prejudice of a third person; that it was as if co-partners, on entering into partnership, should covenant that the stock of each partner should be first liable to the debts which he should owe to the other partner, before the debts which he should owe to any other person. But the Lord Chancellor said, "This is a good by-law; for the legal interest of all the stock is in the Company, who are trustees for the several members, and may order that the dividends to be made shall be under particular restrictions or terms; and by the same reason that this by-law is objected to, the common by-laws of companies, to deduct the calls out of the stocks of members refusing to pay their calls, may be said to be void. As to the other part of the by-law empowering the Company to detain and seize the stock of such member, that is also good; but then there ought to be some act done by the Company, to order or declare that the stock of such member is seized for the debt due to the said Company." [Child v. Hudson's Bay Company, 2 P. Wm's Rep. 207; see also, 1 Bac. Ab. 444; Gibson v. Hudson's Bay Company, 1 Strange Rep. 645; Meliorucchi v. Royal Exchange Assurance Co. 1 Eq. Cas. Ab. 9.]

In the case of *Waln's Assignees v. The Bank of North America*, [8 Serg. & R. Rep. 73,] it appeared that Waln was a stockholder and had been a director of the Bank; that he was legally indebted to the corporation, and made a general assignment, including his stock, for the benefit of his creditors, although he was aware, at the time his indebtedness was incurred, that there was a *usage* of the corporation not to permit a transfer of stock while the holder is indebted to the bank. The

Court considered the right of the assignees to be precisely such as their assignor was entitled to, and say, "The stock passed into the hands of his assignees, subject to all the rights and all the equities of the bank; and this without taking into consideration the evidence of at least the knowledge of one of the plaintiffs of the restriction on transfers, where the stockholder was debtor to the bank. It is reduced to the narrow question, was this regulation of the bank—this usage to retain—this course of dealing between the bank and her customers, unquestionably known as it was to Mr. Waln, binding on him?" *Again*—"The agreement of the stockholders would be equally binding on them, and all who stand in their shoes as a by-law. By-laws bind, because the members of the corporation, either individually, or by those who represent them, are supposed to give their assent to them. A course of dealing—a usage—an understanding—a contract express or implied, is the *lien of the parties and a law to them*, provided they are not repugnant to the charter, or the laws of the land. This is contrary to neither."

The charter of the Union Bank of Georgetown, enacted, "That the shares of the capital stock, at any time owned by any individual stockholder, shall be transferable only on the books of the bank, according to such rules as may, conformably to law, be established in that behalf, by the President and Directors; but all the debts actually due and payable to the bank, (days of grace for payment being passed,) by a stockholder, requesting a transfer, must be satisfied before such transfer shall be made, unless the President and Directors shall direct to the contrary." Upon a certificate issued for fifty shares to one Patton, declaring that the same shall be "transferable at the said bank, by the said Patton, or his attorney, on surrendering this certificate," the question was, whether as against an assignee, the bank was entitled to a lien upon the stock, for the payment of the debts of the assignor. It was held, that no person can acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank under the act of incorporation, of which he is bound to take notice. The President and Directors of the Bank expressly deny that they have waived,

or ever intended to waive the right of the bank to the lien for debts due it, by the form of the certificate, and that they ever directed any transfer to be made to Patton which should stipulate to the contrary; consequently the assignee could not coerce the bank to permit a formal transfer, until the debt due it by the assignor was paid. [Union Bank of Georgetown v. Laird, 2 Wheat. Rep. 390; See also Rogers, &c. v. Huntingdon, 2 Serg. and R. Rep. 77; Seawall v. Lancaster, 17 id. 285.] So in the case of Northrop v. The Newtown and Bridgeport Turnpike Co. [3 Conn. Rep. 544;] the charter directed that "the shares in said Company, shall be transferable only on the books of said Company, and in such manner as the said Company shall by their by-laws direct." By the by-laws "the Board of Directors were to prescribe *the form* of transfer, to be registered by the Clerk." In virtue of this authority, the Directors adopted a form which declares that the stock is to be transferred expressly, with all the privileges, and subject to all the burdens thereunto appertaining. The question was, at what time the transfer should be considered as complete. *The Court held*, that a deed of assignment in the form prescribed by the Directors, was of no avail to convey a title, until actually registered on the books of the Company; that registration operates not merely to perfect a conveyance previously begun, or to give notice of a conveyance previously perfected, but is a fact essentially necessary to originate a title; before the happening of which no title has been or can be perfected.

Let us now notice so much of the charter by which the defendant was created a body corporate as is material, and consider the question before us with reference to the principles we have stated. The second section of the act, among other powers conferred, authorizes the Company to make contracts involving the interest or use of money; to receive monies in trust and to accumulate the same at such rate of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed on. The sixth section provides that no bond or other collateral security shall be required from the said Company, when appointed trustee, guardian or receiver, but all investments of money received by the Company, in either of these characters, shall be at the sole risk of the corporation; and for all losses of such monies, the capital stock, property and effects

of the corporation shall be absolutely liable. And the seventeenth section enacts, that the certificates of stock and of monies received in trust, issued by the corporation, "shall be assignable on the books of the corporation, to be kept at such place or places, and under such regulations as the Board of Trustees shall establish."

The charter does not confer the power to make by-laws for any specific purpose, and consequently that power is not subject to any implied restriction, to a greater extent than are corporations generally. It cannot be pretended that the by-law in question is opposed to any constitutional or statutory provision; and we cannot conceive that it is unreasonable or in restraint of trade. The seventeenth section expressly authorizes the transfer of stock on the books of the Company; but invests the trustees with the authority to establish the regulations under which the transfer shall be made. By the term "regulations," we understand nothing more than "rules," for the transaction of the business to which they relate. These rules must be pertinent to the subject and reasonable in themselves.

The stock of a corporation, or rather its capital, is joint property; the certificate that is issued to the person who has contributed thereto certifying his interest, is not the capital, but is evidence of the number and nominal value of his shares. To some extent the stock is subject to the legislation of the Company, as we have seen was determined in *Child v. Hudson's Bay Company*. That case, which has been frequently cited with approbation, and always, so far as we have observed, without objection, fully maintains the right of a corporation to declare, by a by-law, that the dividends on stock may be made under particular restrictions or terms; and that the stock of members shall be liable to their debts due the corporation, in preference to other creditors or assignees. That the defendant was fully authorized to become both a debtor and creditor, very sufficiently appears from the sections of the charter we have cited—in fact, the Company could not carry out the purposes of its creation without sustaining both relations. It could not become the receiver of money in trust, and pay interest on it, unless it could be allowed to lend at as high, or a higher rate of interest. But it is needless to say more, as the duties

and powers of the corporation in this respect, are clearly pointed out.

From what we have said it will follow that the by-law in question is in conformity to the charter, and dictated by expediency. It is calculated to enable the stockholders to obtain accommodations from the trustees, upon security less satisfactory than the trustees would advance upon, if the stock of members was not pledged for their individual indebtedness. And so much as it restricts the transfer of the stock, probably to an equal or greater extent does it facilitate the obtaining of money by the stockholders, and thus adds to the capital actively employed; so that the inconveniences which result from such a by-law so far as the public is concerned, is entirely neutralized by the private as well as public benefit which proceeds from it.

The certificate of stock, notwithstanding the terms in which it is expressed, cannot be regarded as a negotiable security, so as to vest in an assignee a legal title to the stock, without any further act. The transfer being, by the terms of the charter, to be made on the books of the Company, the assignee receives but a mere equitable interest until the assignment is consummated; and for a refusal to carry out the contract between the assignor and himself, he cannot maintain an action against the Company until its lien has been discharged. This is very satisfactorily shown by several of the cases cited.

2. In respect to the second question, it may be quite enough to say, that the debt for which the lien is claimed, appears to be due by note to the corporation, and for any thing appearing to the contrary, comes within both the letter and spirit of the by-law.

It will follow from what we have said, that the judgment of the Circuit Court is correct; and it is consequently affirmed.

MCNAIR AND WIFE v. COOPER.

1. Where there is a parol executory agreement, made at the time of the execution of a note, if the collateral contract be not executed, it cannot be given in evidence to defeat the action on the note.
2. Upon a refusal to execute the collateral engagement, the principal contract might be rescinded, by putting, or offering to put, the party in *statu quo*; or it might be the foundation of an action for damages for its breach.
3. A witness proved that he had purchased a tract of land from the plaintiff's testator, and proposed to sell it to the defendants, who refused to buy the land unless the notes to be given for the purchase could pass into the possession of the Selma Rail Road Company, which was indebted to them; that this conversation was afterwards communicated by witness to the testator of the plaintiffs, who said that the notes of defendants would answer his purposes as cash, in payment of his stock to the Rail Road Company. Held that this testimony was irrelevant, on the ground that it did not tend to show what the contract really was, which the parties subsequently made.
4. The cases of *Murchie v. Cook & McNab*, 1 Ala. 42; of *Simonton v. Steele*, id. 357; and of *Honeycut v. Strother*, 2 ib. 135, examined and explained.

ERROR to the County Court of Dallas.

This action of assumpsit was brought in the Court below, by the plaintiffs in error, executor and executrix of Uriah Grigsby, deceased, against the defendant, as survivor of the firm of David Cooper & Brothers, on two promissory notes made by them to Uriah Grigsby, for the payment of eight hundred and thirty-three dollars thirty-three cents, each.

Pleas non assumpsit—fraud—failure of consideration—want of consideration—all, in short, by consent—and, also, a special plea in short “that the notes sued on were to be paid to the Treasurer of the Rail Road Company, by the plaintiff, in payment of plaintiff's stock, and the Rail Road Company being largely indebted to defendants, were to take said notes and pay them as money to defendants. To this plea there was a demurrer, which was overruled by the Court, and the plaintiff took issue upon it.

The defendant, to obtain a continuance of the cause, made affidavit that he could prove by one Jeremiah Pitman, that the

notes on which the suit is founded, were given on the purchase of some real estate; that before the purchase aforesaid and execution of the notes, the witness had purchased the land of the plaintiff's testator, and proposed to sell the land to David Cooper, one of the defendants, who refused to purchase the land of witness, unless the notes to be executed by him and Isaac Cooper, (then acting together as partners,) to the plaintiff's testator, would be paid in by said testator, in discharge of his rail road stock, which the witness communicated to the testator of plaintiffs, who then observed that the notes of said defendants would answer his purposes as cash, to pay in his stock with, as he would have the cash to pay, and the notes would be the same to him to pay in his stock.

That from the whole of this conversation he thought it was expressly agreed between Grigsby and David Cooper, acting on behalf of the firm of David & Isaac Cooper, that the notes sued on should be so paid in; upon which the said purchase was consummated and the notes executed.

It being admitted that the witness would swear to these facts, the plaintiff's counsel objected to the testimony because it was oral, and tended to contradict the written evidence, and specially to the latter clause, that it was the *opinion* of the witness, but the Court overruled the objection.

After argument, the Court charged the jury that a verbal understanding or promise such as described in Pitman's testimony, made at or before the time of the execution of the notes sued on, notwithstanding the residue of the contract was reduced to writing was valid and legally binding upon the plaintiff in this action, and if not carried into effect the failure constituted a good defence to this action.

That in such a case as the present, if the defendant's interest can be in any manner affected, he has a right to demand a full compliance with the agreement.

That if the defendant was injured by the misapplication of the notes, no matter how little, even if it were merely being delayed in the collection of the debt from the Rail Road Company, it was a defence to this action.

That the manner or mode of payment of a note can always be shown by parol, as matter of defence; and by way of example, stated that if a note was payable in dollars, it might be

shown by parol that it was payable in corn, and that payment in money could not be enforced.

The plaintiff's counsel requested the Court to charge the jury, that if, from payments made subsequent to the execution of these notes, nothing was owing from the plaintiff's testator to the Rail Road Company, at the time of the maturity of the notes first due of these here sued on, (to prove which evidence has been introduced by the plaintiffs,) that then the plaintiff was not bound to transfer the notes to the Rail Road Company, which instruction the Court refused to give, and the counsel excepted, as well to the instructions given as to the evidence admitted.

After the charges were given to the jury, the Court, without the consent of the plaintiffs, withdrew from the consideration of the jury, the latter part of the testimony of Pitman, consisting of his opinion.

A verdict and judgment having passed for the defendant, the plaintiffs prosecute this writ, and assign for error—

1. In admitting any portion of the evidence of Pitman.
2. In admitting the latter clause, consisting of the opinion of the witness.
3. In the charges given and the refusal to charge as shewn in the bill of exceptions.
4. In overruling the demurrer to the plea.

R. SAFFOLD, for plaintiffs in error, contended that this was an attempt by parol, to contradict a written contract. He cited 1 Johns. Rep. 139; 8 Taunton, 92; 5 Porter, 88; 1 Ala. Rep. 160; *id.* 436; 2 *id.* 280, 571.

The distinction he contended was between the performance of a verbal condition, operating as payment of the note, and a prior or contemporaneous verbal contract unexecuted. In the former it is the subsequent execution, and not the parol agreement, which is operative as accord and satisfaction. That in this case there was no satisfaction, nor any proof that the Rail Road Company assented to the arrangement, and agreed to look to defendant for payment. [4 Mass. 414; 8 Johns. 375; 8 Vermont, 243; 17 Pick. 171; 1 Ala. N. S. 423; 2 *id.* 359.]

GEO. GAYLE, *contra*, maintained that the decision of the

Court below was fully sustained by previous decisions of this Court. He cited 1 Ala. Rep. N. S. 41; id. 357; and particularly the case of Honeycutt v. Strother, [2 Ala. Rep. 135,] which he insisted was expressly in point.

ORMOND, J.—The special plea relied on as a bar to the action is very informal, but was designed we presume to state, that at the time the notes sued upon in this action were executed, it was agreed between the parties that Grigsby, the payee, should transfer the notes to the Selma Rail Road Company, in payment of his stock in the Company—the Company being at the time indebted to the makers of the note.

These facts disclose that at the time of the execution of these notes, (which, from the evidence in the cause, we learn was for a tract of land sold by the payee to the makers,) there was a collateral parol agreement, that the notes should be transferred to the Rail Road Company, which was indebted to the makers of the notes, and the breach of this collateral contract is relied on as a bar to a recovery on the notes; but we are very clear that it cannot have that effect. If it could operate as a bar, it would follow that the makers of the notes would avoid the payment, and also keep the land, and still retain their claim against the Rail Road Company.

If the collateral engagement was executed, it would doubtless constitute a defence to the principal contract. Or, upon a refusal to execute the collateral engagement, the principal contract might be rescinded, by putting, or offering to put, the party in *statu quo*; or it might be the foundation of an action for damages for its breach; but for the reasons assigned, a failure to perform the collateral engagement could be no bar to a recovery on the principal contract. This is the doctrine of the case of Crossman v. Fuller, [17 Pickering, 171.] The Court in their opinion say, “this was a *parol collateral* agreement, which *has been executed*. If it had not been, it could not have had the effect to vary or contradict the terms of the note. Thus if a note were payable in money, a collateral agreement made at the time of the making of the note, that it should be payable in goods, could not be received in evidence. But the party having a claim in virtue of an executory collateral contract,

McNair and Wife v. Cooper.

must pursue his remedy upon the agreement itself for a breach of it."

So in this case, if the defendants have sustained injury by the failure of the plaintiff to transfer the notes to the Rail Road Company, they may sue for the breach of that contract and recover the damages they have actually sustained. But they cannot plead such failure in bar of an action on the notes, not only because it would be to contradict the written contract of the parties by parol, but also because the amount due on the notes would not be the criterion of the damages sustained by the breach of the collateral engagement, and would, therefore, be necessarily unjust to one of the parties. The demurrer should, therefore, have been sustained to the plea.

The evidence which the defendant proposed to adduce in support of the plea, did not tend to prove that any collateral contract, such as is described in the plea, had ever been entered into by the parties. It appears that the witness had first purchased the land of the plaintiff's testator, and proposed to sell it to the defendants, who refused to buy the land unless the notes to be given for the purchase, could pass into the hands of the Rail Road Company, which was indebted to them—that this was afterwards communicated by him to the plaintiff's testator, who said that the notes of defendants, would answer his purposes as cash, in payment of his stock to the Rail Road Company. This testimony merely shows what the parties were willing to do at some time previous to the making of the contract; but it has no tendency to show what the contract really was at the time it was made, and should, therefore, have been excluded from the jury as wholly irrelevant.

This disposes of the entire case, and shows that the Court erred in its judgment on the demurrer to the plea, in its refusal to exclude the testimony, and in the charges given to the jury.

Three cases, heretofore decided by this Court, have been pressed on its consideration, as leading to a different conclusion. They are the cases of *Murchie v. Cook & McNab*, 1 Ala. Rep. 42; *Simonton v. Steele*, id. 357, and *Honeycutt v. Strother*, 2 ib. 135.

In the first of these cases, the head note indicates that parol evidence is admissible to prove, that where a note was executed

there was an agreement to receive in payment *the debt of a third person*.

The defect of this note is, that it does not state, as was the fact in that case, that the agreement was executed. The facts as shown by the report of the case were, that upon a sale of goods to Murchie, it was agreed to receive in payment a debt due him, which those selling the goods had assumed to pay, and the note sued on, which was for the amount of the goods thus taken up, was executed because the amount of the debt thus assumed, was not then precisely ascertained. As soon then as the goods were received, under this contract, it extinguished the debt thus assumed, or in the language of the Court in the case, "discharged *pro tanto* the debt due the plaintiff in error from McMahan, Murchie & Co." Having given the case again a critical examination, we are satisfied it is correctly decided, and is entirely consistent with the rule that a written agreement, cannot be varied by parol evidence. To prove by parol that a note is extinguished or discharged, no more contradicts it, than to prove that it was made originally without consideration.

The facts of the case of *Simonton v. Steele*, were, that the consideration of the note sued on, was some other notes on a third person, upon the agreement that if these notes could not be used in a suit then pending against the maker of the note, they were to be returned and the note cancelled. The notes thus received could not be used as a set-off. There can be no doubt that this evidence was admissible; it merely established that the consideration for which the note was given had wholly failed, proof of which has never been considered as conflicting with the rule in question.

The remaining case of *Honeycutt v. Strother*, [2 Ala. 135,] is more especially relied on. The facts were, that Honeycutt had purchased a piece of land from one Adams, and given him three notes for the purchase money. He afterwards sold the same land to Strother, at the same price he had given for it, taking from him three notes for the same amount, and falling due at the same time with those held by Adams, and assigned to him the bond for title he had received from Adams. There was, at the time, a parol agreement that these notes should be delivered up to Adams, and substituted for those which he held

on Honeycutt. This Honeycutt failed to do, but transferred one of the notes to a third person, who sued Strother in Honeycutt's name. The question was whether Strother could prove this parol agreement executed, by showing that he had paid Adams the amount of the note held by him on Honeycutt.

This Court held that such proof was admissible, and upon a review of the case, we are satisfied it was correctly decided. That was like the case at bar, the case of a parol collateral agreement, made at the time the note was executed, but which unlike the case at bar was carried into effect. The substance of the contract in the case cited, was that Strother was to pay Adams for the land, and to accomplish this, Honeycutt was to make an exchange of the notes held on him by Adams. It appears that he did not do this, but that Strother paid Adams; which was in its effect, if not literally, an execution of the parol agreement. Had this not been done, Strother could not have defended himself when sued on the note executed by him to Honeycutt.

The result of all the cases is, that where there is a parol executory agreement, made at the time of the execution of the note, if the collateral contract be not executed, it cannot be given in evidence to defeat the action on the note, because that would be to contradict by parol the written agreement of the parties. But if the collateral agreement be executed, it will be a good defence to an action on the note; not because such proof would show a different contract from the one described in the written instrument, but admitting it to be as stated, will show its *discharge* in the nature of an *accord* and *satisfaction*. [See *Crossman v. Fuller*, 17 Pickering, 171; *Walker v. Russell*, id. 280; and *Bradley v. Bradley*, 8 Vermont, 243.]

Let the judgment be reversed and the cause remanded.

BLOUNT AND STANLEY v. TRAYLOR.

1. Where a creditor omits to sue out execution until after the death of his debtor, no lien attaches upon his personal estate, in the hands of his administrator, who is bound to apply them in due course of administration, and whose claim will prevail against the levy made under an execution issued after the death of the debtor.

WRIT of Error to the Circuit Court of Chambers.

Claim, under the statute, to a slave levied on at the suit of Traylor by an execution against John Davis.

The facts, so far as they are connected with the only matter decided by the Court, are these :

Davis died on the 8th of October, 1840, no execution having then issued. On the 23d of the same month, this execution was issued, and levied on the 2d of November of the same year on the slave in controversy. Blount and Stanley took out administration on Davis' estate and interposed their claim on the 1st March, 1841.

At the trial the claimants made title in two ways:

1. As the mortgagees of the slave by deed from Davis, to secure the payment of a note falling due 1st March, 1841.
2. Under the administration.

It was shown that they had returned an inventory in which this slave was described as Davis' property, but subject to their mortgage.

Under this state of proof, they requested the Court to instruct the jury—

1. That if Davis was dead when the execution issued, it was void.

2. That, under the circumstances there was not such a possession in the mortgagor as was liable to sale under execution, and in either event, a verdict should be rendered in their favor.

These charges the Court refused, and in lieu of them the jury was instructed—

Blount and Stanley v. Traylor.

1. That the claimants could not question the regularity or validity of the execution.

2. That if the claimants held possession of the slave, not as mortgagees, but as administrators of Davis, their possession was equivalent to the possession by Davis, and created such an equity of redemption as was liable to the execution.

This was excepted to and is now assigned as error.

STONE, for the plaintiff in error.

GUNN, contra.

GOLDTHWAITE, J.—The matter in question here, is not merely whether the execution is void in consequence of having issued after the death of Davis, for as between these parties the validity of the execution cannot be inquired into. [Bettis v. Taylor, 8 Porter, 564.] But considered in another aspect, the fact that Davis died before any lien existed on his goods, is quite decisive of this case. The plaintiff in execution not having sued out his execution in the lifetime of his debtor, has no claim which is entitled to a preference over any other creditor, and as by the administration the title to the decedent's goods passed to the administrators, to be applied in due course of administration, their claim is necessarily paramount to that derived under the execution.

The decision in the case of Collingworth v. Horn, [4 S. & P. 237, 250,] concedes that if that case had shown a case of facts precisely similar to those now before the Court, that the title of the administrator would prevail against the execution.

As the execution has already been quashed, and the levy discharged, there is no reason for remanding the cause.

Let the judgment be reversed.

ORMOND, J.—By several early decisions of this Court, the *claimant* on the trial of right of property, was prohibited from inquiring into the regularity of the judgment, or execution, under which the plaintiff in execution claimed. Following out these decisions, in Bettis v. Taylor, [8 Porter, 564,] we held that the claimant could not object that the execution under

Salter v. Pearce.

which the plaintiff claimed had issued after the death of the defendant in execution. The execution in such a case may, however, be quashed at the instance of any one affected by it, after which it is obvious the plaintiff in execution can no longer proceed, as the levy is discharged by quashing the execution. Such was the fact in this case, and for that cause, if no other existed, the claimant was entitled to a verdict.

SALTER v. PEARCE.

1. Where an action of detinue is brought against two, and a verdict is found against one, and in favor of the other, in the absence of any thing in the record to show the character of the caption and detention, they may, on error, be intended to be tortious, and a judgment according to the finding be sustained.

WRIT of Error to the Circuit Court of Butler.

The defendant in error brought an action of detinue against the plaintiff and Unity Pearce, for the recovery of three slaves. The cause was tried by a jury, who, by their verdict, say "that they find the defendant, Unity Pearce, does not detain the property of said plaintiff, and that said defendant, Salter, detains the said slave Jesse, from said plaintiff, and assess his damages for the value of said slave at the sum of eight hundred dollars, and they further assess the hire of said slave at the sum of one hundred and three 25-100 dollars."

On this verdict a judgment was rendered against Salter and in favor of Pearce; and it is now assigned for error that the verdict does not sustain the judgment.

ELMORE, for the plaintiff in error. Detinue was no other than an action of debt in the *detinet* instead of the *debet*; that it belonged to the class of actions *ex contractu*, and that if the jury did not find a verdict against all the defendants, the plain-

tiff was not entitled to a judgment against any less number, who the jury may have found to be guilty of a wrongful detention of the thing sued for. To sustain this view he cited, 2 Reeves' Hjs. Eng. L. 261, 331-3; 3 id. 67; 1 Chit. Plead. 118.

Cook, for the defendant.

COLLIER, C. J.—In actions *ex delicto*, each of the defendants is liable for his own wrongful act, and it is competent for the plaintiff to proceed jointly or severally against those who have participated in it. If the plaintiff brings his action against several, but only makes out a case against one, he is entitled to a verdict and judgment against him on whom the proof fixes a liability. [Arch. Civ. Pl. 240, a.; 1 Chit. Pl. 65, *et post.*] But independent of any statutory regulation, the law is otherwise as it respects actions *ex contractu*. There the declaration supposes the contract to be entire, and jointly obligatory upon all who are sued, and if the plaintiff fails to make out his case against either of the defendants, he is not entitled to judgment against such as may be justly chargeable. [Arch. Civil Pl. 240; 1 Chit. Pl. 65, *et post.*]

The material inquiry in this case is, to which of the general classes of actions, the action of detinue is assignable. The older editions of Chitty's Pleading considered it under the head of actions *ex contractu*, for the reason doubtless, that in its origin it was regarded as an action of debt in *detinet*; and in many of the elementary books, it was said not to be sustainable when the goods came *tortiously* into the defendants possession. This latter notion it is said originated with *Brian, C. J.* in the reign of Henry VII. who held that detinue could not, in such case, be supported; because, by the trespass, the property of the plaintiff was divested, and in order to support detinue, the property in the chattel must be vested in the plaintiff at the time of the commencement of his action. This very fallacious reasoning, if ever followed, has been long since repudiated. The gist of the action is the wrongful detention of the thing, not the original caption, and it is regarded as wholly unimportant whether the defendant's possession was acquired by a bailment or trespass.

Different writers upon the law of pleading have assigned detinue to each of the classes of actions, according as their respective opinions inclined, while others have considered it, as partaking according to circumstances, of either class, but not susceptible of classification. We think that detinue cannot be always considered an action *ex contractu*. Conceding that such is its character when the defendant's possession commences under a contract of bailment, yet where the taking is *tortious*, the detention must be alike wrongful. Without reference to the manner of taking and detaining, the form of the declaration is always the same, so that we cannot learn from the pleadings whether the possession was legally acquired. And whatever may be the law in such case, (which we need not determine,) wherever there is a *tortious* taking, the action is *ex delicto*. The inference being allowable that the proof established such a caption, the verdict which is against one, and in favor of the other defendant, afforded a warrant for a judgment accordingly.

The consequence is, that the judgment of the Circuit Court is affirmed.

THE STATE V. HINSON ET AL.

1. It is not necessary to enter a formal discontinuance as to those on whom process is not served; by taking judgment against the others, the cause is, in law and in fact, discontinued as to them.
2. Where the undertaking of sureties was for the appearance of their principal to answer the charge of the State against him, on his failing to appear, the recognizance was forfeited, and it was not necessary to call the sureties to produce their principal.
3. A judgment rendered on a forfeited recognizance must follow the condition; if that is joint the judgment must be joint also.
4. A judgment cannot be rendered against the sureties to a recognizance for a larger sum than the penalty.

ERROR to the Circuit Court of Barbour.

Indictment for betting at *Faro*, against Allen V. Robinson. A *capias* having been executed on him, he entered into a recognizance in the sum of three hundred dollars, together with the plaintiff and others as his sureties, in the sum of three hundred dollars, to be levied separately, and conditioned for the appearance of Robinson at the next term of the Court.

Robinson having failed to appear, a judgment *nisi* was rendered on the recognizance "that the State of Alabama recover of the said Allen V. Robinson, and the said John W. Hinson, William C. Gilder, S. G. Devereaux, Thomas S. Woodward and William F. Baldwin, his said securities, said sum of three hundred dollars, unless they and each of them make their appearance," &c.

A *scire facias* issued and was returned executed on all except Robinson, the principal, and one of the sureties, and thereupon the Court rendered final judgment against those on whom service was effected, "for the said sum of three hundred dollars, with interest thereon from the 29th March, 1842," &c.

The defendants prosecute this writ and assign for error—

1. That as the *scire facias* was not served on all the defendants, judgment should not have been rendered against those on whom it was executed, but that an *alias sci. fa.* should have issued.

2. The final judgment does not show a discontinuance against the defendants not served with process.

3. That the judgment *nisi* does not show that the bail were called and required to surrender their principal, or that Robinson, the principal, was required to appear and answer to the offence.

4. That there is error in the final judgment in this, that in the recognizance the principal and bail are both bound separately, while the judgment is against the defendants collectively.

5. The judgment is for a greater sum than the amount of the recognizance.

BELSER, for plaintiff in error, cited 1 Ala. Rep. 113; 6 Hal-

stead, 124; 3 Stewart and Porter, 426; 5 Yerger, 133; 15 Peters, 209; 3 Cowen, 155; 8 id. 424; 6 id. 583.

THE ATTORNEY GENERAL, *contra*.

ORMOND, J.—The two first assignments of error question the regularity of the judgment because an alias *sci. fa.* was not issued against those defendants not served with process, and without formal discontinuance against them in the judgment. This proceeding is a civil action, and to be governed by the same rules, and there was therefore an undoubted right on the part of the State to discontinue as to those on whom the writ was not served, and proceed to judgment against the others. [Aik. Dig. 267, §56.] We are of opinion that it is not necessary to enter a formal discontinuance of the action as to those on whom service of the process has not been effected. By taking judgment against the others, the cause is in fact and in law, discontinued as to them, and it could subserve no purpose whatever formally to enter the fact on the minutes of the Court. [See *Oliver v. Hutto*, at the present term.]

We think it sufficiently appears in the judgment *nisi* that the recognizance was forfeited—it is stated that the defendant being solemnly called to appear and answer the charge against him, came not, but made default—it was not necessary to call the sureties to produce their principal; their undertaking was for his appearance to answer the charge against him, and on his failing to appear the recognizance was forfeited.

The case of *Howie v. Morrison*, [1 Ala. Rep. 120.] shows that where a judgment is rendered on a forfeited recognizance it must follow the condition. The condition of this recognizance is, that the principal is bound in the sum of three hundred dollars, and the sureties jointly in the same sum, to be levied separately of their respective goods and chattels. The judgment is joint against the sureties, and therefore follows the condition of the recognizance, it would have been a departure from the condition, to have joined the principal in the same judgment.

In rendering judgment for a larger sum than the penalty of the bond, the Court erred. There is a considerable conflict of

Quarles v. Glover.

authority on this point, and there may possibly exist cases in which the principal may be bound beyond the penalty of his bond, but if such be the law in regard to the principal, it cannot apply to a surety, as is explicitly admitted in the cases in which the principal was held to be thus bound. The judgment in this case, going beyond the penalty, must be reversed and here rendered for the penalty.

QUARLES v. GLOVER.

1. The discharge of the maker of a promissory note, when arrested on a *ca. sa.* by his creditor, is not such a satisfaction of the debt as to relieve the indorser from his liability to the creditor upon the indorsement.

WRIT of Error to the Circuit Court of Perry.

Assumpsit by Quarles against Glover as administrator *de bonis non* of the estate of Grigsby, on his intestate's indorsement of a promissory note.

At the trial the defendant gave evidence that the plaintiff had sued out a *ca. sa.* on his judgment, against the maker, and after arrest had directed him to be discharged. There was also evidence tending to show that if he had not been thus released, the money would probably have been made. The Court charged the jury, if they should believe the money might have been made by said arrest, except for the discharge from custody, that it was a defence to the action, and the plaintiff ought not to recover.

The plaintiff excepted, and now seeks to reverse the judgment against him, on the ground that this charge is erroneous.

BECK, for the plaintiff in error, cited McDonald v. Bovington, 4 Term, 825; Lenox v. Prout, 3 Wheat. 520; Digest, 226, §2.

 Quarles v. Glover.

J. ERWIN, for defendant.

GOLDTHWAITE, J.—It must be conceded that there are many cases found in the books which seem to warrant the charge of the Court, but none of them, when examined, go so far as this. Thus it has been held that if the plaintiff discharge one of several defendants on a *ca. sa.* he cannot retake him or any of the others. [Clark v. Clement, 6 Term, 525.] And if a bond given to the plaintiff with a condition to render in execution, one who was thereupon discharged, the condition is void. [Da Costa v. Davis, 1 B. & P. 242.] If a prisoner is permitted to go out of prison with the consent of the plaintiff, neither the sheriff nor the plaintiff can afterwards retake him, by virtue of the same or any other execution, for he is thereby said to be discharged from the judgment. Therefore, if debt or *sci. fa.* be afterwards brought on the judgment, the defendant may plead the discharge; or, if he be afterwards taken in execution, the Court, on motion will set aside the execution and discharge him out of custody. [1 Sand. 35, a., note 1; Vigers v. Aldrich, 4 Burr. 2482; Jaques v. Withey, 1 Term. 557.]

We have said none of the decided cases go so far as this; but a *dictum* of Lord Eldon asserts the precise principle ruled by the Circuit Court. [English v. Darley, 3 B. & P. 61.]

The circumstance that it is usual in the English courts to enter satisfaction of the judgment when the defendant has been permitted to go at large from custody upon a *ca. sa.* connected with the dictum of Lord Eldon in the case of English v. Darley, render it necessary to trace this matter to its source, to see if his expression rests on a solid foundation.

Amongst the earliest decisions upon the nature and effect of a *ca. sa.* is the opinion of Lord Hobart, in Foster v. Jackson, [Hobart, 52, a.] There the question, upon a special verdict was, whether a defendant dying in custody was a discharge of the debt, so far as the administrator was connected with it. The whole law in connection with this execution is examined at great length, and it was then held the execution was a satisfaction *in law*, notwithstanding the death of the debtor, and even the same when he should escape. In both particulars

the law was afterwards changed, by act of Parliament. [21 Jas. 1 c. 24; 8 and 9 Will. III. c. 26.]

In the consideration of that case, after ascertaining the effect of a *fieri facias*, and *elegit*, which could be renewed until the whole debt was made, the learned Judge adds, "But if a *capias* be executed, that is in law sufficient for the whole debt; for *corpus humanum non recipit estimationem*, so as if you take it all, you must take it for the whole debt." Again, "it is agreed on all sides, that whereas the *elegit* or *fi. fu.* are both executions and satisfactions to all purposes and against all persons, the *capias* is a full execution, but is not a perfect satisfaction in value to all purposes and against all persons. I agree clearly that it is not an actual satisfaction, no, not between the parties; for when one was bound to satisfy for goods that he had embezzled, and in debt upon an obligation, he pleaded that upon a suit for those goods he was taken in execution for the damage, this was adjudged no plea. But this is nothing to the case in question; for without doubt it is no satisfaction to common speech, nor to a foreign plea. The question is, whether it be not *quasi* satisfaction, or satisfaction in law, to that very suit; for if an executor releases a debt, or discharge one in execution, it shall be accounted in law assets as received. Again, it is no satisfaction clearly, as to bar one to seek satisfaction against another liable to the same debt or damages."

It will be seen that it is the *taking* of the body upon the *ca. sa.* which is considered as the satisfaction in law, and that the *keeping* it is entirely immaterial; for if the prisoner escapes or dies, the result is precisely the same.

In several of the cases cited, but particularly those of *Vigers v. Aldrich* and *Jacques v. Withy*, the defendants were discharged upon conditions which they afterwards did not comply with, and, therefore, without a knowledge of the true rule, the discharge would seem to have been accorded to them for a violation of their engagements; but the reason for these, and indeed for all the decisions, is that the *taking* of the body was in itself a perfect satisfaction in law, and the discharge was entirely immaterial. So far as the person of the debtor, or his administrator after his death, the plaintiff has no remedy; but according to the opinion quoted, this legal satisfaction was never

held to bar the plaintiff from pursuing any other person liable for the same debt or damages.

If, as we have endeavored to show, it is the taking of the body which causes the satisfaction in law, and this is only personal between the defendant and the plaintiff, then the discharge by the act of the party has no other or greater effect than the discharge by death or by an escape. In the two last cases, the plaintiff's remedy is gone forever, and yet the right to pursue any other person remains in full force; no greater effect can be given to the parties own act, inasmuch as it only produces the same results.

The case of McDonald v. Bovington, [4 Term, 825,] is somewhat similar to this. There a bill drawn by McDonald on Bovington, was indorsed to Thompson, who charged Bovington in execution, but he was discharged as an insolvent. Then Thompson sued McDonald and recovered. McDonald paid the bill, sued Bovington and charged him in execution. On a rule to discharge him, it was urged that Bovington had satisfied the debt by being formerly charged in execution by Thompson for the same debt. But Lord Kenyon said, that nothing could be clearer than that he had not, for it was a *mere formal satisfaction, not like actual payment*, and when McDonald paid the debt, a new cause of action arose against the defendant for the payment, without regard to what passed in the former action.

This is, indeed, a stronger case than the one before us, for it shows that even when legally discharged under an insolvent act, it was no discharge as to any other party; but it is indeed nothing more than the iteration of the opinion of Lord Hobart.

When such a question as this, is considered with reference to the kinder feelings of our nature, it is very difficult to conceive how one member of society can be, even to the slightest extent, compelled to hold another in confinement for the mere purpose of forcing money from his distress, and such would be the effect if all collateral engagements were released by the discharge of the principal debtor. Our ancestors, it seems, took a more humane, as well as a more liberal view, and though they gave the process to the creditor, as the means of coercing an unwilling debtor, they did not consider his abandonment of

Quarles v. Glover.

it, any more than its exercise, as having the effect to discharge any other than the debtor himself. The only doubt we have entertained about this matter, was with respect to the indorser's right to a subrogation of the creditor's claim, unimpaired by any release or discharge; but as we have been able to find no case going to such an extent, we conclude that he is only entitled to such remedies as the creditor has retained against his debtor; the more especially as even the right to imprison may be revived by a suit in his own name, as was done in *McDonald v. Bovington*.

Independent of these views and reasons, which are sufficient to show that without any enactments by statutes, the creditor is permitted to release his debtor without forfeiting any rights against other parties liable to him, we cannot shut our eyes to the circumstance, that our whole course of legislation on the subject of this execution, has been in favor of the liberty of the citizen.

The plaintiff is not now entitled to the *ca. sa.* as a matter of course. but in order to obtain it, is required to make oath, that his debtor either has or is about to convey his effects fraudulently, or fraudulently conceals the same, or that he is about to abscond; and even then the debtor is entitled to his discharge if he will take a prescribed oath. [Meeks' Sup. 104.] Whatever may be the effect of a voluntary discharge by the creditor of his debtor, so far as the latter is personally answerable to the *ca. sa.* or other process of execution, we consider that it has not the effect to discharge any other party liable for the same debt.

This conclusion shows that the charge cannot be sustained, and the judgment of the Circuit Court is therefore reversed and remanded.

LUCAS v. DOE EX DEM PRICE.

1. Where an original *fi. fa.* was issued in the lifetime of the defendant, and returned unexecuted, an *alias* or *pluries fi. fa.* issued after his death, will not authorize the levy on, and sale of, lands of which the defendant died seized.
2. An administrator *cum testamento annexo*, who is appointed upon the failure of the executors to qualify, cannot execute a power to sell lands conferred upon the latter by the will.

This was an action of ejectment brought by the defendant in error, in the Circuit Court of Tallapoosa. The usual consent rule being entered into, the cause was tried on the plea of *not guilty*. On the trial, the defendant below excepted to the ruling of the Court. From the bill of exceptions, it appears that J. Doss purchased and obtained a patent for the premises in question from the United States; that a judgment was recovered against him in the Circuit Court of Tallapoosa, on which an execution issued; but previous to its return he died. The *fi. fa.* was returned unsatisfied, and after the intervention of a vacation, an *alias fi. fa.* was issued and returned without having been executed; whereupon a *pluries fi. fa.* was issued and levied upon the land in controversy, which was regularly sold to the lessor of the plaintiff, who received a Sheriff's deed therefor.

Doss made a will appointing two executors, and invested them with power to sell his real estate. The executors did not qualify as such, but an administrator was appointed *cum testamento annexo*, who disregarded the sale made by the Sheriff, and under the power contained in the testator's will, sold the premises in question to the plaintiff's lessor, and conveyed the same to him by deed. This was all the evidence adduced by the plaintiff.

The defendant proved that Doss, previous to the judgment against him, executed his bond to H. Young, conditioned to make him title to the lands in dispute, in consideration of one thousand dollars paid him by the latter. Young died in possession of the bond for titles, and the land agreed to be con-

veyed was, upon the petition of his administrator setting forth the insufficiency of personal assets to pay the debts of the intestate, decreed by the Orphan's Court to be sold in the manner provided by statute. At the sale of the commissioners, the defendant became the purchaser and received from them a deed. It was admitted that the defendant was in possession of the land at the commencement of the action and still retains it.—The sale under the decree of the Orphan's Court, was subsequent to the sale at which the plaintiff's lessor purchased.

The Court charged the jury, if they believed that the facts above stated were true, they must find for the plaintiff.

The jury returned a verdict for the plaintiff, and judgment being thereupon rendered, the defendant prosecuted a writ of error to this Court.

HEYDENFELDT for the plaintiff in error. The issuance of the *alias fi. fa.* after the lapse of a vacation, was irregular and the process void. [4 Stewt. & P. Rep. 237.] The sale under the *pluries fi. fa.* passed no title to the purchaser; for the land, by the death of Doss, vested in his heir, [2 Bla. Com. Ch. 14,] and admitting the lien of the judgment to continue, it could only be enforced by suit in Equity, to which the heir would be a necessary party. The heir is even authorised to call on the personal representative to pay for lands which the ancestor has purchased. [2 Wms. Exors. 1039, 1080.] The doctrine of marshalling assets, forbids the sale of real property after the ancestor's death, under an execution against his estate. [Fonb. Eq. 284 a 302; 4 Ves. Rep. 538.]

The sale by the administrator *cum testamento annexo* of Doss, was void. 2 Wms. Exors. 623-5-6-8; Co. Lit. 113 a. Aik. Dig. 156, sec. 17, 450; sec. 14.]

Doss' bond to Young, conveyed to him the legal title. [1 Blac Com. 157; Roper v. Bradford, 9 Porter's Rep. 354; 5 Porter's Rep. 327-413.] The Orphan's Court had the right to order the sale of the land as Young's property, and the purchase of the plaintiff in error invested him with the title.

No counsel appeared for the defendants.

COLLIER, C. J. 1. The *feri facias* which issued previous

Lucas v. Doe ex dem Price.

to the death of Doss, was certainly regular; but whether it would have been allowable after that event, to have executed it by levying on and selling the *real estate* of which he died the proprietor, it is unnecessary to consider. That it is competent to levy an execution on the *goods* of a defendant after his death, if previously issued, seems to be well settled. To this point Collingsworth v. Horn, [4 Stewart and Porter's Reports, 237,] is an authority. In that case it was determined, that where a writ of *fi. facias* has issued against an intestate in his lifetime, an *alias* and *pluries* might be issued thereafter, and *personal property* levied on and sold in order to satisfy the judgment; that the first writ created a lien in favor of the plaintiff, which was continued and perfected in virtue of the retrospection of the latter. In fact the several writs were regarded as a mere continuation of the process, which was necessary to complete the execution. But the reasoning employed by the Court in that case, has no application to the one before us. Here, if it were conceded that the original *fi. fa.* retained its vitality after the death of Doss, as against his "lands and tenements," yet as that writ originated no lien upon them, the *alias* and *pluries* cannot connect themselves with it, for the purpose of showing that they are regular; and it will not impart to them an energy which they do not intrinsically possess. The judgment itself operates a lien upon the real property; that is, it gives a right to have that property sold in order that it may be satisfied. By the death of the defendant his lands descend to his heirs, or vest as he may devise by will, and the mandate of an execution which directs the sheriff to make of them the amount of a judgment, must be wholly inoperative and void. In fact such a writ could never be executed in consequence of the death of the defendant, which has cast his estate upon other proprietors. And such is the law in respect to personal property, where an execution has not issued against the defendant in the judgment, while living; and it is only the lien of a *fi. fa.* regularly issued that legalizes an *alias* or *pluries* which bears teste after the defendant's death. [Woodcock v. Bennet, 1 Cow. Rep. 711; McCartney's lessee v. Read, 5 Ohio Rep. 221; Pratt v. St. Clair's heirs et al, 6 Ohio Rep. 238.]

2. It is not shown by the bill of exceptions, whether the devise by Doss to his executors was a mere naked power to sell his real estate, or whether it conferred a power coupled with an interest; nor does it appear whether the purpose for which a sale was to be made was defined by the testator. But the view which we take of the question of the right of the administrator *cum testamento annexo*, to sell the lands of his testator, makes it unnecessary that we should consider the extent of the power intended to be granted to the executors.

An executor *virtute officii* at common law, had no right to take possession of the lands of his testator. If they are devised they pass to the devisee, who may enter upon and take possession—if undevised they descend to the heirs, who are entitled to the possession. If the real estate is required to pay debts of the testator, the executor may obtain an order for the sale of so much as is necessary, although it be in the possession of the devisee or heirs, or their assignee or disseissor. [Leavens v. Butler et ux, 8 Porter's Rep. 380.] The property of the executor in the personality, is as plenary as was that possessed by his testator while living, controlled in its disposition however, either by law or the will. [1 Lomax's Ex'rs. and Adm'rs. 343, *et post.*]

Where executors are authorized by the will to sell land, it is said they are invested with a naked power, which it has been supposed would cease with the death of any one of them. But on this subject there is a want of harmony in the authorities; some of them maintaining that a devise to executors, with directions to sell passed the legal estate, and the power survived with the interest; some hold that a power conferred upon executors *nominatim* will not survive; while others are inclined to the conclusion that a devise *that executors shall sell land*, as well as a devise of *lands to be sold by executors*, invests them with an estate in the lands, and not merely a power. [1 Sugden's Powers, 141, *et post*; 1 Lomax's Ex'rs. and Adm'rs. 361, *et post.*]

It is entirely unnecessary to notice the contrariety of opinion on this point, or attempt to state what is the common law upon the various phases it may assume. We have a statute passed in 1806, which enacts that "The sale and conveyance of lands tenements and hereditaments, directed or devised to be sold,

by any last will and testament, shall be made by the executors or such of them as undertake the execution of the will, if no other person be therein appointed for that purpose, or if the person so appointed shall refuse to perform the trust, or die before he shall have completed it." [Aik. Dig. 450.] Whether this act is introductive of a new rule of law, or is merely declaratory, we will not inquire. It is explicit in its terms, and provides, 1. That a direction or devise to sell lands, shall be executed by the executors, unless some other trustee is appointed: 2. If more than one executor is appointed, it authorizes such of them as qualify to sell: 3. And if the trustee, or either of the executors, die before a sale, the survivor shall execute the trust.

The powers of an administrator, with the will annexed, are the same as those which pertain to an executor *as such*, [1 Lomax. Ex'ors. & Adm'rs.] and the question is, whether a devise to sell land is a trust extraordinary, or comes within the appropriate functions of an executor. From what has been said, it would seem that it is the former. This question was largely considered in *Conklin v. Egerton's Adm'r.* [21 Wend. Rep. 430.] There, as in the case before us, the inquiry was, whether an administrator *cum testamento annexo* could execute a power conferred upon the executor, to sell and convey real estate. The conclusion of the Court was, that a testament concerned the personal property merely, and though by statute it was allowable to make a will of the realty, it did not follow that the person appointed to execute it would, as to all its provisions, be regarded as an executor. He might be considered a mere *donee of a trust power*, and where he was authorized to sell lands he would be a trustee, and could not be charged as an executor for any thing in relation to the trust. That an administrator with the will annexed, who succeeded only to the executorial functions of his predecessor, could not, in virtue of his representative character, execute an independent trust. [See also *Judson v. Gibbons*, 5 Wend. Rep. 224; *Wills v. Cowper*, 2 Ham. Rep. 124.] And such was the decision in *Conklin v. Egerton's Adm'r.*; although a statute of New York provides, that "in all cases where letters of administration with the will annexed, shall be granted, the will of the deceased shall be observed and performed; and the administrators of

Lovely v. Caldwell.

such will shall have the rights and powers, and be subject to the same duties, as if they had been *named executors in such wil'.*"

In the *Lessee of Moody et al. v. Van Dyke et al.* [4 Binney Rep. 31,] it was determined, that where there is a naked power to executors to sell, and they renounce, administrators *cum testamento annexo*, have not at common law authority to sell, although the object of sale be the payment of debts. To these cases, many citations might be added; but they are so full and satisfactory in their reasoning, and so well supported by the authorities referred to, by the learned judges who adjudicated them, that we do not deem it necessary to amplify this opinion.

The view we have taken, shows the title of the plaintiff to be too defective to sustain his action. This being the case, we will not inquire into the validity of the title set up by his adversary, as he can derive no aid from it.

We have only to declare that the Judgment of the Circuit Court is reversed and the cause remanded.

LOVELY v. CALDWELL.

1. J. H. C. and W. A. G. being partners, the latter, upon the dissolution of the firm, agreed to pay the former a specified sum of money for his interest, and the former expressed a wish that the latter would pay the money to his brother S. W. C. to whom he said he was indebted. The latter replied that it was immaterial to him to whom he paid the money. Subsequent to this, W. A. G. was garnished by the plaintiff, a creditor of J. H. C., and the jury having found J. H. C. was indebted to S. W. C. at the time of the transfer of the debt to him—held that the money in the hands of W. A. G. was not subject to the garnishment of the plaintiff.

ERROR to the Circuit Court of Greene.

Assumpsit commenced by original attachment by the plain-

tiff in error, against James H. Caldwell. Process of garnishment issued against Samuel W. Caldwell and Williamson A. Glover. The latter states in his answer, that he and James H. Caldwell were partners engaged in business, and that on the 19th December, 1839, he proposed to James H. to sell his interest in the concern, either to him or to some other person; and finally agreed to buy out the interest of James H. himself, paying him therefor the sum he had put in the business, twelve hundred dollars, and such profit or interest for the use of the same, as two disinterested persons might say was just. At the time this purchase was made, James H. expressed a wish that the money might be paid to his brother Samuel, to whom he said he was indebted; to which the garnishee replied it was immaterial to him to whom he paid the money.

An issue being made up under the statute, to try whether the debt due from Glover was the property of Samuel W. Caldwell, or subject to the payment of the claim of the plaintiff.—The plaintiff introduced in evidence an instrument in writing to the following effect.

Know all men by these presents, that I have this day bargained and sold to Samuel W. Caldwell, all my right, interest and claim in the firm of Glover and Caldwell, for the consideration of several notes and claims which he holds against me.

JAMES H. CALDWELL.

December 20, 1839.

The defendant also proved that James H. Caldwell was indebted to him in a considerable sum of money, and that there was a good consideration to support either a sale of the partnership effects or a transfer of the debt due from Glover.

The Court instructed the jury, that if they believed the testimony of Glover, the facts as stated by him touching the request of James H. to pay to defendant, and his reply, all in the presence of defendant, amounted to a legal transfer of the debt, if they found from the testimony there was a good consideration to support it; to which the plaintiff excepted.

The plaintiff then moved the Court to charge the jury, that if there was no express promise from Glover to Samuel W. to pay him the money, that it did not amount to a legal transfer,

Lovely v. Caldwell.

which the Court refused, and to which the plaintiff also excepted.

The jury found for the defendant, and judgment was accordingly rendered, from which this writ is prosecuted. The plaintiff assigns for error, the charge as given and the refusal to charge as moved for.

PIERCE for plaintiff in error, cited 4 S. & P. 184; 1 Ala. Rep. 315; Chitty on Contracts, 111, 112; 3 Ala. Rep. 679.

THORNTON, contra.

ORMOND, J.—The jury having passed on the *bona fides* of the transaction and found that there was a sufficient consideration to support the transfer of the debt due from Glover by James H. to Samuel W. Caldwell, the only question which remains is, whether the debt was in fact transferred by what took place between the parties? The facts were, that after the sale of the partnership interest by James H. Caldwell to Glover, the former requested the latter to pay the money to his brother Samuel W. Caldwell, who was then present, to which Glover replied that it was immaterial to him to whom he paid the money.

It is perfectly clear that this was a sufficient authority to Glover to pay the money to Samuel Caldwell; but did he acquire such an interest in the debt, that Glover could not afterwards have paid it to James Caldwell without his consent? It appears to us that he did. It does not appear that there was any written evidence held by James H. on Glover, for the debt in question; it was a mere verbal agreement to pay a sum of money which could not be transferred so as to confer the legal title. The question here is not whether this direction to Glover, to pay the money to Samuel Caldwell, and assented to by Glover, vested the legal title in Samuel Caldwell so as to enable him to maintain an action in his own name; but it is whether he acquired the right to the money, although to recover it he may have been compelled to use the name of James Caldwell. It is laid down in the books, that where a promise is made by one for the benefit of a third person, he may maintain an action upon it. [1 Bos. & Pul. 101, and note b.] But in

Le Baron v. James.

the view we take of this case, it is not necessary that Samuel Caldwell should have had the legal title so as to maintain an action against Glover in his own name. It is sufficient that the interest of James Caldwell in the debt had passed from him, and vested in the defendant Samuel Caldwell, before any right accrued to the plaintiff, by the levy of his attachment. This was the fact as appears from the evidence of Glover, and we are therefore of the opinion that the Court did not err, either in the charge given or in that refused.

It may be proper to add that it appears that the debt due from Glover was by an instrument in writing, transferred by James to Samuel Caldwell previous to the garnishment. This was sufficient to invest him with the equitable interest, and without any assent on the part of Glover to pay him, would have protected him against the garnishment, on notice of that fact to Glover. In every aspect in which we can consider the case, there is no error in the judgment of the Court, and it must be affirmed.

LE BARON v. JAMES.

1. The 8th section of the attachment act of 1837, does not warrant the suing out of an ancillary attachment in an action of detinue. This process is authorized in such actions only as can be commenced by original attachment.

A MOTION is submitted by the plaintiff for a rule to show cause why a mandamus should not issue, requiring the Circuit Court of Clarke County, to reinstate an ancillary attachment in the above entitled case, which was quashed at the last term.

The action is detinue to recover certain slaves and was commenced by capias. Afterwards the ancillary process was sued out on the affidavit of the plaintiff, setting out one of the reasons required by the 8th section of the act of 1837.

 Bartlett & Waring v. McRae.

PECK for the motion.

BLOUNT contra.

GOLDTHWAITE, J.—It is evident from an examination of the statutes authorizing the process of attachment, that it was intended to be given only in cases of money demands, and even with respect to these it deserves consideration whether the process is not confined to those which are of a liquidated nature, or capable of precise ascertainment. It is true, when the ancillary attachment is given by the 8th section of the act of 1837, very general terms are used; but these are controlled by subsequent expressions, showing very clearly that the ancillary process is warranted only in those actions which could be commenced by original attachment.

Motion denied.

BARTLETT & WARING v. McRAE.

1. Where several judgments for the same debt are recovered against the surviving partner and the administratrix of the deceased partner, the latter cannot, by paying the amount due, and obtaining an assignment of the judgment against the former, continue the same in force and have execution thereof in the name of the plaintiff, in order to her reimbursement.

WRIT of error to the Circuit Court of Mobile.

This was a motion to quash an execution upon the following state of facts, which appear by bill of exceptions. It was admitted that a judgment was rendered against the defendant in error, as the surviving partner of McRae & Lang, for a partnership debt; that an execution was issued thereon and returned "no property found" as to part. Upon this return, the plaintiffs commenced suit under the statute against Catherine Lang, as the administratrix of the deceased copartner, and re-

Bartlett & Waring v. McRae.

covered a judgment against her as such; and, thereupon, she paid the residue remaining unpaid on the judgment of the plaintiffs against the defendant, and took an assignment of the judgment in the following words, "know all men by these presents that we, John Bartlett, jr. and Moses Waring, for and in consideration of the sum of six thousand seven hundred and twenty five (66-100) dollars, lawful money, to us in hand paid by Catherine Lang, administratrix of Willis Lang, deceased, have assigned, transferred and set over and by these presents do assign, transfer and set over unto the said Catharine Lang, administratrix, all our right title and interest in and to two certain judgments recovered by us against Collin C. McRae, surviving partner of McRae & Lang, in the Circuit Court of Mobile county, at the spring term 1838; one of which was for the sum of \$7,435 21, recovered on the 21st May, 1838; the other for the sum of \$7,442 75, recovered on 1st June, 1838. Upon which said judgments has been paid, by the said C. C. McRae, surviving partner, the sum of \$10,383 66, inclusive of costs; leaving the balance due to us above mentioned of \$6,725 66, which includes interest up to the 4th March, 1842. To have and to hold the said judgments to her, the said Catharine's use, so that she may have upon the same all legal remedies secured to us by the said judgments. In witness whereof, we have hereunto set our hands and seals, this 17th of March, 1842."

JOHN BARTLETT, Jr. [seal.]

MOSES WARING, [seal.]

In presence of
Dudley Hubbard. }

The execution in question was afterwards issued in the name of the plaintiffs, at the instance of Mrs. Lang, and the Court refused to quash it, but ordered satisfaction of the judgment to be entered of record. Waring, one of the plaintiffs in execution, and also the attorneys of Bartlett & Waring appeared and admitted the above facts, and were willing to enter satisfaction. Mrs. Lang objected, but the Court allowed it to be entered. It further appeared that a bill in Chancery was pending at the suit of Mrs. Lang against the defendant in error, for the settlement of the partnership accounts between McRae & Lang;

Bartlett & Waring v. McRae.

which bill was filed previous to the suit of the plaintiffs in error against Mrs. Lang.

DARGAN, for the plaintiffs in error, insisted, that Bartlett & Waring having assigned their judgment against the defendant to Mrs. Lang, could not prevent her from suing an execution in their name against the defendant in error. That they could give no consent, nor make any admission which would oppose the express terms or legal effect of the assignment; and the judgment of the Court, whether with or without the approbation of the nominal plaintiffs, is erroneous.

STEWART, for the defendant. The payment of the amount due on the indebtedness of McRae & Lang, whether made on the footing of the judgment against McRae, or Lang's administratrix, is a satisfaction of both judgments. The law is not varied by the paper called an assignment of the judgment against the former—the legal effect of the transaction is to satisfy, and of consequence, destroy the vital energy of that judgment. This result would follow from the fact that the debt was a joint charge upon McRae and his deceased co-partner, though the remedy for its recovery from both sources would be several.

COLLIER, C. J.—It has been frequently said that the death of one partner, terminates the partnership as to future dealings; yet the rights, duties, powers and authorities of the survivors remain, so far as may be necessary to enable them to wind up and settle the firm. One of the consequences of a dissolution thus effected is, that the personal representatives of the deceased become tenants in common with the survivors of the partnership property and effects in possession. As to the choses in action, and other rights of action, *at law* they belong to the survivors, who possess the exclusive right to reduce them into possession; but when recovered, the survivors are regarded as trustees thereof, for the benefit of the partnership; and the representatives of the deceased partner possess in equity the same right of sharing and participating in them, which the deceased partner would have possessed if he had been living. [Story on Part. and citations in the notes, 492-3-4.] So it is laid down,

that independent of any special covenant, or distinct several contract, one partner cannot maintain a suit at law against the other partners, for money paid or advanced, or liabilities incurred on account of the partnership. *First*, because in such a suit all the partners, including himself, must be made defendants. *Second*, because it is impossible to know, until all the partnership concerns are ascertained and adjusted, whether a particular partner be a debtor or a creditor of the firm; for although he may have made large advances on account thereof, he may be indebted to the firm in a much larger amount. If one partner could recover of the other for his advances, they in turn might maintain a cross action, the determination of which would not adjust the respective rights and liabilities of the parties. To prevent litigation so profitless and inconclusive, a Court of Equity will afford the appropriate remedy, wherever *ex æquo et bono* it is necessary and proper; and that tribunal will finally settle the accounts of the partnership and award to each member of the concern the measure of justice to which he is entitled. [Story on Part. 318 to 326; 513 to 515, and citations in notes. Grigsby's Ex'ors. v. Nance, 3 Ala. Rep. 347.]

In Marr's Ex'or. v. Southwick, Cannon & Warren, 2 Porter's Rep. 351, it was held, that a creditor of a partnership could not recover in equity against the representatives of one of the partners who was dead, the surviving partner not being shown to be insolvent. Mr. Justice Story says such was the doctrine formerly held on this subject, but continues, "it is now held, that in equity all partnership debts are to be deemed joint and several; and consequently the joint creditors have in all cases a right to proceed at law against the survivors, and an election also to proceed in equity against the estate of the deceased partner, whether the survivors be insolvent, or bankrupt, or not." [Story on Part. 514, and citations in notes.]—After the decision of the case in 2 Porter's Rep., a statute was enacted, which gives an action at law in such case, against the representatives of the deceased partner, subject to the following provisos: "*Provided*, the plaintiff shall, before instituting such suit, make affidavit in writing before the Clerk of the proper Court, or Court itself, to be filed with the papers, that the survivor is insolvent or unable to pay the amount of the debt, or is beyond the jurisdiction of the Court. *Provided, however*,

Barlett & Waring v. McRae.

that when any such representative is sued separately, which may be done without such affidavit, no execution shall issue against such representative, until an execution is *bona fide* run and returned *nulla bona* as to the survivors." [Bartlett & Waring v. Lang's Administratrix, 2 Ala. Rep. N. S. 404.]

We have been thus particular in stating the foregoing principles, as they seem to us to point to a conclusion in the case before us.

Now, although the death of Willis Lang dissolved, *ipso facto*, the partnership between himself and the defendant, as to all future operations, yet we have seen that the dissolution did not exclude his representative from all interest in the assets of the firm. As to those in possession, she was a tenant in common, and as to those in action, she was a *cestui que trust* with the defendant, who was a *trustee*, for their joint benefit. The defendant's liability for the payment of the debts of the firm, was absolute, and at law primary, yet the administratrix' might also be sued at law, under the statute, or in equity, for the recovery of the same right. So that, notwithstanding the death of one of the partners, the debts owing at the occurrence of that event, are a several charge on the administratrix and the survivor. This being the case, the satisfaction of the judgment against either, must be regarded an extinguishment of the right against both. Upon principles of analogy, as well as direct reasoning this must be so.

The payment of the judgment recovered against Mrs. Lang, did not give her a right of action against the defendant, but her remedy, as we have seen in such case, would be in equity, where the Chancellor would adjust the accounts of the parties, and ascertain the balance between them. A satisfaction of that judgment would, we have already said, inure to the discharge of the judgment against the defendant, and leave nothing due which the plaintiff could assign. What would have been the effect if Mrs. Lang had, with her own means, have paid the judgment against her, and taken an assignment to herself, individually, it is unnecessary to consider; in the entire transaction she seems to have represented her intestate's estate.

The consequence is, the judgment of the Circuit Court is affirmed.

WILLIAMSON V. HOWELL ET AL.

1. The surety of an administrator in the absence of fraud is concluded by the settlement of his principal with the Orphans' Court.
2. The omission of an administrator to bring forward at the settlement of the estate, charges against it which he might have preferred, will not authorize the surety to have a re-settlement of the estate in Chancery, although the administrator may be insolvent.
3. To constitute fraud in the settlement of an estate, the legatees or those interested in it, must collude with the administrator.

ERROR to the Chancery Court of Camden.

This was a bill filed by the plaintiff in error, and alleges that he became some years since the surety of Lucy M. Howell, as administratrix with the will annexed of Caleb Howell, deceased—that she afterwards intermarried with one Joseph Arrington, who thereby, in right of his wife, became administrator of the estate, and that for mismanagement of the estate, the letters of administration were revoked, and Arrington and wife being cited to settle their administration of the estate, appeared and made a settlement, and that a judgment was entered in favor of each of the legatees, against them. That this decree was reversed by the Supreme Court, because the judgment was not rendered jointly against Arrington and wife—and that, upon the cause being remanded, a decree was again entered in favor of the same legatees, for fourteen hundred and thirty-seven dollars and fifty cents each. That execution has issued thereon against Arrington, and been returned no property found, and that execution has issued against complainant as their surety.

The bill further alleges that Arrington and wife being insolvent, and to increase the distributive shares of the legatees, the children of Lucy M., fraudulently withheld, at the settlement of the estate, charges for monies paid out of the assets of the estate, for the necessary board, clothing and tuition of the children, to the amount of eight hundred dollars, and debited

Williamson v. Howell et al.

themselves for monies which had been previously accounted for by complainant, as administrator, to the amount of two hundred and forty dollars—and further, that Arrington had showed him a large amount of claims against said estate which he had withheld.

That two of the legatees of the estate, knowing the injury done to the plaintiff in the settlement of the estate, had received from him the sum of eight hundred and forty dollars, in full of their claim; but that Caleb M. Howell, the remaining legatee, insisted on the amount for which the decree was rendered, and that execution had issued for the amount thereof. Arrington and wife and Caleb Howell are made parties, and an injunction prayed for, which was granted.

The Chancellor dismissed the bill for want of equity, from which this writ is prosecuted.

BETHEA, for plaintiff in error.

F. K. BECK, contra.

ORMOND, J.—This bill is filed by the surety of an administrator, alledging that his principal, in his settlement with the County Court, being insolvent, and knowing that the money would have to be paid by the surety, fraudulently omitted to charge against the estate monies that he had paid out of the assets of the estate, for the board, schooling and clothing of the legatees, and also debited himself with money which had been previously accounted for, amounting to two hundred and fifty dollars.

There is some obscurity in these allegations, as they appear to assume that the administrator may subject the estate in his hands to a charge, which it is very certain he cannot do. It further appears that the administrator had married the widow of the deceased, and if the board of her infant children was intended as a gratuity to them, he was not only not under any obligation to charge them, but it would have been improper to do so.

Independent, however, of considerations of this kind, the principle which must govern this case, was determined in the case of *Townsend and Gordon v. Everett*, at the present term, in which we held that a surety was bound by those acts of his

principal which he was by law required to perform, and for the performance of which the surety was responsible.

In that case, Gordon was the surety of Townsend, as treasurer of Mobile county, and in that capacity Townsend made a report to his successor, as by law he was required to do, showing the amount of money in his hands as treasurer, which we held evidence of that fact, in an action against the surety on his bond.

So in this case, it was the duty of the administrator to settle his accounts with the Orphans' Court. In the performance of this duty a sum of money is ascertained to be due from him to the estate, and as he is concluded by this judgment, so must his surety be also. But this is something more than a mere admission of the principal, in the performance of a duty cast on him by law; it is the judgment of a Court, rendered on ample public notice, in which the plaintiff in error had a deep interest, as his principal was insolvent; it was therefore his duty to attend the settlement and protect his rights—his failure to do so, can be considered in no other light than gross laches.

It is further alledged that this settlement was fraudulently made. The fraud is supposed to consist in the withholding by the administrator, of claims against the estate, which he ought to have, or might have, preferred against it. It is not alledged that the heirs colluded with the administrator to produce this result, or that they were privy to it; and without their agency, consent, or privity, we are unable to perceive how the settlement could be fraudulent. Conceding that the amount for which judgment was rendered could have been reduced by evidence of payments, in the power of the administrator to procure, at the settlement of the estate, if the omission was not caused by the act of the legatees, or those interested in the estate, the administrator is forever concluded by the judgment: and if he is, the surety who is bound for his acts must be also. It would be productive of the greatest delay and injury, if, after the settlement of an estate, the surety could have the whole matter re-examined in Chancery, on the ground that the administrator had omitted, at the proper time, to bring forward all his charges against the estate; for this is the whole amount of the bill when properly understood. Calling the settlement

Hall v. Dargan.

fraudulent does not make it so, nor could it be so without the concurrence of those to be benefitted by it.

Our conclusion therefore is, that although a fraudulent settlement of an estate in the Orphans' Court, with intent to prejudice the surety, might be overhauled by him in Chancery, the allegations of the bill do not make out such a case—and that the mere fact that the administrator omitted to prefer charges against the estate which he might have made, will not authorize the surety to go into Chancery for a resettlement, although the administrator may be insolvent.

Whether the bill might not have been entertained, if the surety had shown that the necessary advertisement for a settlement of the estate had not been made, or if he had shown a sufficient excuse for not being present according to the notice, it is not necessary now to determine, as the bill contains no such allegation.

There being no error in the decree of the Chancellor it must be affirmed.

HALL v. DARGAN.

1. After verdict in a trial of the right of property it is too late to object that no formal issue was before the jury, the record showing a trial as upon an issue.
2. The omission of the jury to insert in their verdict the *sir-name* of the defendant in execution, is wholly immaterial, as the entire sentence could be struck from the verdict without impairing its effect ; if necessary the name would be supplied by intendment.
3. A prior indorser is not entitled to have satisfaction entered upon a judgment against him, when the bill indorsed by him is paid by a subsequent party and the judgment prosecuted for his benefit ; but under no circumstances has the claimant, in the trial of a right of property, the right to inquire into the execution.
4. When a claim is interposed by a trustee, for the wife, the husband is not a competent witness.

WRIT of error to the Circuit Court of Autauga.

Claim of property under the statute.

The proceedings which appear in the transcript of the record, are—

1. An execution at the suit of E. S. Dargan against Dixon Hall, with the return of the sheriff of a levy on certain slaves thereon named, and the further return that the same were claimed by William S. Hall, and bond given to try the right.

2. The affidavit of William S. Hall, asserting that the slaves levied on by virtue of Dargan's execution, as the property of Dixon Hall, was the affiants own right and property, as trustee, &c. and not the property of the said Dixon Hall.

3. The bond executed by the claimant.

No issue is found in the record, and it is conceded by the plaintiff in execution that none exists in the Court below. The judgment entry recites that the parties came by their attorneys, and thereupon came a jury, &c., who being elected, tried and sworn to try the issue joined, upon their oath do say, they find the negroes levied on by the plaintiff's execution, to be the property of Dixon, and not the property of the claimant, and find the property subject to the said execution. Then follows the assessment of the value of each slave, and the judgment of the Court condemning them to sale, or satisfaction of the execution, and rendering costs against the claimant.

In the progress of the trial a bill of exceptions was sealed, at the instance of the claimant, which discloses that the judgment on which the execution issued was founded on a bill of exchange, drawn by Samuel W. Apperson, on one A. C. Lore, in favor of one David S. Campbell, and by him indorsed to Dixon Hall, and by him to Crawford M. Jackson, and by him to Dargan, the plaintiff in execution.

It was also shown that Dargan had been paid the sum due on this bill of exchange by said Jackson, and that an assignment of the judgment had been made by him to Jackson, for whose benefit the judgment was kept open. On this evidence the defendant in execution came into Court, and moved that satisfaction of the judgment should be entered of record. The Court overruled the motion, on the ground that Jackson, the third indorser, had a right to pay the money due on this judgment, and to be substituted by the plaintiff thereon to all his

Hall v. Dargan.

rights; and could control the judgment and collect the money for his own use.

In the further progress of the trial, the claimant offered Dixon Hall, the defendant in execution, as a witness, to whose competency the plaintiff objected on the ground that the claimant, William S. Hall claimed the property, the subject of controversy, as the trustee of Elizabeth Hall and children, who were the wife and children of the witness so offered. The property levied on was conveyed by the will of Dixon Hall, sen'r. to the claimant for the sole and separate use of the said Elizabeth Hall and her children.

On proof of these facts, the Court excluded the witness on the ground that he was the husband of the person for whose use this property was held in trust.

A verdict was returned and judgment given for the plaintiff, which the claimant now seeks to reverse on the grounds—

1. That no issue was joined between the parties in the Court below.
2. That the judgment does not condemn the slaves levied on as the property of the defendant in execution.
3. Because the Court refused to enter satisfaction on the record of the judgment against Hall.
4. That Hall, the witness offered, was improperly excluded.

WILLIAMS and GEORGE GAYLE, for the plaintiffs in error.

HAYNE and GEORGE GOLDTHWAITE, contra, cited the following authorities to sustain the rejection of the witness: *Davis v. Dinwiddie*, 4 D. & East, 678; 7 J. J. Mar. 203; *id.* 263; 2 Stark. 707; 2 Phil. Ev. C. & H's. notes, 151.

GOLDTHWAITE, J.—The omission of a formal issue is not a matter which ought to cause a reversal of a judgment in any case, but the more especially in this, where only one and that a prescribed issue could be tried by the jury. [Digest, 168, §45.] In *Abercrombie v. Moseley*. [9 Porter. 145,] when speaking of a similar omission, we say "it is always within the power of the plaintiff or defendant to require the pleadings to be in the regular form, and they can respectively claim judgments of default or non pross if the regular steps are omitted. With this

Hall v. Dargan.

right completely in their power on the circuit, it is unjust that parties should be permitted after a trial, as if an issue was made and submitted to the jury, to reverse the judgment for the omission of a replication or rejoinder." The same reasoning applies with equal if not greater force, to cases like the present; and we do not hesitate to declare that it must govern.

2. It is next urged, that the omission of the jury to state the sir-name of the defendant in execution in the verdict, which declares the slaves in question to be his property, is a sufficient reason to avoid the judgment. We cannot think so, because the whole sentence could be rejected without impairing the verdict, or the name would be supplied by intendment; for the only just conclusion is, that it is omitted by the clerical misprison of the jury or of the clerk in recording it. In no aspect is it a matter to cause a reversal.

3. The refusal of the Court to enter satisfaction of the judgment upon which the execution issued, or the motion of the defendant in execution, was proper enough for several reasons; firstly, because on the payment of the bill of exchange by Jackson, he was right in requiring of Dargan either to assign the judgment or prosecute it for his use against Hall, who was a prior indorser; but chiefly because the motion had no connexion or relation to the issue then before the Court. This principle was settled in *Bettis v. Taylor*, [8 Porter. 564,] and *Stone v. Stone*, [1 Ala. Rep. N. S. 582].

4. If the witness who was offered and rejected, had stood merely in the relation of a defendant in the execution, he would have been competent, unless the title passed from him to the claimant coupled with an express trust for his benefit; or unless one would result to him from the circumstances of the conveyance; but in addition to this relation, it appears that his wife was the individual to be benefitted by the successful prosecution of this claim. Husbands and wives can never be witnesses for each other, and it makes no difference in the principle that the interest of the wife is only equitable in consequence of the legal title being vested in a trustee. Such was the case of *Davis v. Dunwoody*, [4 D. & E. 678,] where the action was trover against the Sheriff, for seizing and selling goods conveyed in trust for the sole and separate use of the wife of the witness. The action was in the name of the executrix of the

Salle v. Light's Ex'rs, use, &c.

surviving trustee, and the husband was offered as a witness to prove the identity of the goods. The Court of Kings Bench held him to be incompetent, on the ground of public policy.— Other cases might be adduced in support of the exclusion, but they are deemed unnecessary, as the point is too clear to admit of illustration.

Our conclusion is that there is no error in the judgment, and it is affirmed.

SALLE v. LIGHT'S Exr's, USE, &c.

1. Where personal property is sold with a warranty of title, the vendee cannot maintain an action against the vendor, upon an allegation that his title was defective, unless he has been first charged at the suit of another person, whose right has been adjudged to be paramount, and the judgment has been satisfied, at least in part. A declaration which does not substantially alledge these facts, is demurrable.
2. In an action by the vendee of personal property against the vendor upon a warranty of title, a judgment against the vendee at the instance of a third person, claiming to be the rightful owner, of which suit the vendor had no notice, is not evidence to prove that the title of the latter was defective. But it seems, that such judgment is admissible to prove the amount of damages recovered; and is conclusive of the invalidity of the vendor's title, if it was obtained without fraud or collusion, upon notice given to him of the pendency of the action.
3. A count in an action on a warranty of title, which alleges that a slave sold by the defendant to the plaintiff, and by the latter to L. had been adjudged to be the property of B. in an action of detinue prosecuted by him against L., does not state a good cause of action. So a count in such case is alike defective which deduces the defendant's liability from the recovery of B. against L., the satisfaction of that judgment, by the latter, his reimbursement by the plaintiffs, and a notice of these facts to the defendant.
4. To entitle the plaintiff to recover of his vendor on a warranty of the title of personal property, where he had sold the same to L., of whom B. had recovered it, the declaration should alledge that the plaintiff was informed of the pendency of the suit against L. in order that he might defend the same; and further, that B's. title was superior to the defendant's.
5. The measure of damages in an action for a breach of a warranty of title on the sale of personal property, cannot exceed the damages sustained by the vendee.

WRIT of error to the Circuit Court of Mobile.

This was an action of covenant at the suit of the defendants in error against the plaintiff. The declaration as filed, contained five counts, but a *nolle prosequi* being entered as to two, the cause was tried on three; all of which alledge, that the defendant below, on the 29th day of October, 1828, by his writing obligatory of that date, bargained, sold and delivered to the testator of the plaintiffs, for the consideration of seven hundred and fifty dollars, the following slaves, to wit: Ned, a negro man, and Daniel, a boy; "to have and to hold said slaves to the said Wm. Light and his heirs forever;" the defendant covenanting by his writing obligatory, "to defend the title to the said property against all legal claims whatsoever." The first count, after alledging the appointment of plaintiffs as executors of William Light, &c., states that they afterwards "sold and delivered the said negro man, Ned, to one Henry Lazarus, who was afterwards, and before the commencement of this suit, dispossessed of the said slave named Ned, by due course of law, he the said Henry Lazarus, claiming the said slave under the sale aforesaid, and under the said William Light, and under the title of the said George F. Salle, so made by the writing obligatory aforesaid; of all which said several matters, the said defendant had notice, to wit, at the county aforesaid; and so the said plaintiffs say, that the said defendant hath not kept his covenant," &c.

The second count, after stating the bill of sale and covenant, proceeds as follows:

"And the said plaintiffs aver, that the said defendant has broken his said covenant in this, to wit: that the said slave Ned, having been sold to the said Henry Lazarus, one James A. Beale commenced in the Circuit Court of Mobile county aforesaid, his certain action of detinue for said slave, Ned, and at the November term, 1833, recovered judgment for the said slave, or his alternative value of fifteen hundred and ten dollars, and costs of suit, which judgment the said Lazarus had paid, whereby the said plaintiffs, as executors of the said William Light, deceased, were bound to pay, and did pay to the said Henry Lazarus on their sale and warranty to him, a large sum, to-wit: two thousand dollars; of all which defendant had

Sallee v. Light's Ex'rs, use, &c.

notice, against which the said defendant did not defend them, the said executors of said William Light, deceased; whereupon they say that said defendant has broken his covenant," &c.

The third count after reciting the covenant, continues, "and the said plaintiff avers and in fact saith, that at the time of making said writing, the said defendant had no interest or property in or to said slave Ned, but the true property was in one James A. Beale; and the plaintiffs aver, that the said slave Ned was of great value, to-wit: of the value of two thousand dollars; wherefore they say, that the said defendant has broken his covenant with the said William Light in his lifetime, and has not performed it either to the said William Light, in his lifetime, or to the said plaintiffs, as his executors, since his death," &c.

The defendant craved oyer of the bill of sale and covenant therein contained, and set it out; he also craved oyer of an assignment thereon written, and set it out in these words, "For value received I hereby assign and set over to Henry Lazarus, the within sale and covenants therein contained, and authorize the said Henry Lazarus in my name, as administratrix of William Light, deceased, to commence and prosecute all suits at his own costs, against George F. Sallee, on the covenants therein contained. The said assignment being made without any recourse on me. February second, eighteen hundred and thirty five. Witness my hand and seal.

C. E. LIGHT, [seal.]

Adm'r. of Wm. Light, deceased.

Attest: Isaac H. Erwin, Benj. Wilkins."

The defendant then demurs to the first count, assigning for cause, 1. That the breach is alleged to have happened to Henry Lazarus, and the damages to have been sustained by the plaintiffs for his use. 2. That the writing obligatory is described as dated the *ninth*, when its true date is the *twenty-ninth* day of October, 1828.

1. For plea to the second count, the defendant craved oyer of the bill of sale therein described, and the assignment thereon written, and set them out, and says *actio non*, because he says that Henry Lazarus did by deed, bearing date on the second day of February, 1835, in consideration of the sum of two hun-

dred dollars to him in hand paid by Mrs. Catharine E. Light; and for the further consideration of the assignment of a liability of George F. Sallee, discharge her individually, as well as the estate of her deceased husband, William Light, and all persons interested therein, from all liability on account of the bill of sale and warranty therein contained.

2. For plea to the third count, the defendant, after craving oyer of the bill of sale therein described and assignment thereon written, and setting them out, says *actio non*, because he says that on the day when the bill of sale was made, the negro Ned was a slave, and was then and had been for a long time previously in his possession, under a *bona fide* purchase for a valuable consideration, and was delivered to William Light: and so he avers he has not broken his covenant with William Light in his lifetime, or since his death with his administrators.

3. The defendant further pleads, the contract contained in the assignment, written on the bill of sale, in bar of a recovery on the second and third counts.

4. He also pleaded a plea to both these counts, in substance the same as the first plea to the second count.

5. *Further*: The defendant pleaded, that he hath not broken his covenant either in the lifetime of William Light, or since his death.

6. *Again*: That he had an interest and property in the negro man Ned, at the time of the sale and delivery to William Light.

7. *And lastly*: That he hath kept and performed his supposed covenant or warranty, with William Light in his lifetime, and with his executors since his death.

The plaintiff craved oyer of the supposed release relied on by the fourth plea, and set it out *in hæc verba*. "In consideration of the sum of two hundred dollars to me in hand paid by Mrs. Catherine E. Light, of the city of Mobile, the receipt of which I hereby acknowledge, and for the further consideration of the assignment of a liability of George F. Salle, I hereby discharge her individually from all liability, harm, or injury, on a warranty bill of sale for a negro man named Ned, sold to me in the lifetime of her husband William Light, by the said William Light. I further discharge the estate of the said William Light and all persons interested therein, from all liabilities to

Salle v. Light's Ex'rs, use, &c.

me on account of said bill of sale and warranty of title to the said negro man, Ned.

"Witness my hand and seal, this second day of February, eighteen hundred and thirty-five.

HENRY LAZARUS, [seal.]

Witness—Benj. Wilkins, Isaac H. Erwin.

They then demur generally to the fourth and all the other pleas. The Circuit Court overruled the demurrer to the first count of the declaration, and sustained the demurrers to each of the pleas; and the defendant declining to plead over, the cause was submitted to a jury as on writ of inquiry, who returned a verdict for the plaintiffs, for three hundred and eight dollars and forty-four cents. For that sum, together with costs, judgment was rendered.

SALLE, *in propria persona*, submitted a written argument, in which it is insisted that neither the nominal plaintiff or Lazarus could maintain an action against him for a breach of warranty. The latter could not have the benefit of Salle's contract with Light, because it was not legally assignable under the statute of 1807 or 1812. [Aik. Dig. 327-S.] Neither William Light or his executors, have ever been sued for the slave Ned; the defendant below has had no opportunity of defending the title he conveyed to the testator; had no connection with the suit between Beale and Lazarus; and consequently cannot be charged for a breach of his warranty. The recovery against Lazarus was as to the defendant *res inter alios acta*. Lazarus can maintain no action against Light's executors; his release estops him, and will enure to the benefit of the defendant, so as to prevent any action by them against him.

A warranty does not run with a chattel, so as to make the defendant liable to Lazarus. [Platt on Cov. 27; 1 Shep. Touchs. 184; 1 Co. Lit. 101, b.; Riddle v. Mandeville, 5 Cranch's Rep. 327; Bac. A. tit. B.] This being the case, the defendant had no right to interpose a defence to the suit by Beale.

The executors of Light do not show a right of action in themselves; for it is not alleged that either their testator or themselves have been dispossessed of the slave Ned, by action and title paramount—an allegation indispensable to the suffi-

ciency of the declaration. [Day v. Chism, 10 Wheat. Rep. 449. See also 1 Johns. Rep. 517; 13 Johns. Rep. 226; 14 ib. 253; 19 ib. 77.]

The last count alleges that the property in Ned was in Beale, and not in the defendant. Let this be conceded and it affords no ground of action; for it does not appear from that count that Beale has or will ever assert his title.

It is laid down in the civil law, that if the purchaser loses the thing sold by his default, or defends himself ill; does not give notice to the seller, or consents to a reference or transaction, without the seller's consent, or in any manner prejudices the warrantor's condition, he cannot demand compensation of him. [Domat's Civ. Law. 82.]

The plaintiff in error also cited, Phil. Ev. 222-6-7, note, and 231; 1 Starkie's Ev. 190; 2 H. & Munf. Rep. 139; 1 Johns. Rep. 517; 2 id. 1, 4; 3 id. 11, 12; 7 id. 258, 173; 11 id. 122; 13 id. 224; 14 id. 253; 19 id. 77, 296.

CAMPBELL, for the defendant in error.

COLLIER, C. J.—The legal sufficiency of the entire declaration was brought to the view of the Circuit Court by the demurrer to the first count, taken in connection with plaintiff's demurrer to the pleas, and we propose to consider the law, as applicable to every part of it. It may be premised, that the express covenant contained in the bill of sale of defendant, is nothing more than a warranty of title, and consequently confers the same rights and imposes the same obligation, and nothing more. To entitle the vendee to recover for a breach of such a contract, he must show that he has been deprived of the thing sold, by title paramount, though it is not necessary that he should allege a deprivation of the property in these precise terms. It is enough if the breach be stated in words of equivalent import. Thus in Day et al v. Chism, [10 Wheat. Rep. 449,] it appears the defendant covenanted and agreed by indenture with the plaintiff, his heirs and assigns, to warrant and defend the title to the premises described, against the claim of all and every person whatsoever, as his own proper right in fee simple. The plaintiff averred that the defendant "had not a good and sufficient title to the said tract of land; and by rea-

son thereof, the said plaintiffs were ousted and dispossessed of the said premises by due course of law." The Court say, "This averment, we think, contains all the facts which constitute an eviction by title paramount. The person who, from want of title is dispossessed and ousted *by due course of law*, must, we think, be evicted by title paramount." In *Abbott v. Allen*, [14 Johns. Rep. 253,] it is said, "The marked distinction between a covenant of seisin, and those for quiet enjoyment and general warranty, consists in this, that the covenant of seisin, if broken at all, must be so at the very instant it is made; whereas, in the latter covenants, the breach depends upon the subsequent disturbance and eviction, which must be affirmatively alleged, and proved by the party complaining of the breach." And in *Vibbard et al. v. Johnson*, [19 Johnson. Rep. 77,] it was held, if a purchaser voluntarily pays the price of the goods purchased, to a third person, who claims them, he cannot afterwards in a suit brought by the vendor against him for the price, set up the want of title in the vendor, and that he had paid the price to the true owner as a defence. The Court saying, "The plaintiffs below being in possession of the tea, sold it as his property to the defendants. [Kennedy v. Strong, 14 Johns. Rep. 128.] They cannot in this way draw the plaintiff's title in question by their own voluntary act of payment. It is not competent to them to dispute the title of their vendor, unless they have been charged at the suit of another person, who has after contestation shown a better title. The principle is analagous to a demise of a house by A. who is in possession claiming title, to B. The latter receives the possession, and enjoys the premises by the permission and on the letting of A. In an action for the rent, B. cannot set up that A. has nothing in the premises, and that he has paid the rent to C. voluntarily. If C. had recovered the rent and substantiated his title, then it would be a good defence; otherwise not." See also *Livingston v. Bain*, 10 Wend. Rep. 384.

In respect to the effect of the recovery by Beale against Lazarus, it may be laid down generally, that in an action by the vendee of personal property against the vendor, upon a warranty of title, a judgment for the property against the vendee by a third person claiming to be the rightful owner, in a suit of which the vendor had no notice, cannot be given in evidence

Salle v. Light's Ex'rs, use, &c.

to prove that the latter had *no title*. [Sanders v. Hamilton, 2 Hayw. Rep. 226; Stevens v. Jack, 3 Yerg. Rep. 403; Jacob v. Pierce, 2 Rawle's Rep. 204; Blasdale v. Babcock, 1 Johns. Rep. 517; Burrill v. West, 2 N. Hamp. Rep. 190; Coventry v. Barton, 17 Johns. Rep. 142; Stone v. Hooker, 9 Cow. Rep. 154; Copp v. McDugall, 9 Mass. Rep. 1; Bond v. Ward, 1 Nott & McC. Rep. 201. See also Leather v. Poultney, 4 Binn. Rep. 356; Maupin v. Compton, 3 Bibb. Rep. 214; Booker v. Bell, id. 175; Prewit v. Kenton, id. 280; Radcliff v. Ship, Hardin's Rep. 292; Somerville's Ex'ors. v. Hamilton, 4 Wheat. Rep. 230; Green v. The New River Company, 4 T. Rep. 590.] But it has been held, that although a judgment recovered under such circumstances, will not be evidence of a want of title in the vendor, yet it is *admissible* to show the *amount of damages assessed*. [Tyler v. Ulmer, 12 Mass. Rep. 166; Carmack v. Commonwealth, 5 Binn. Rep. 184; Lewis v. Knox, 2 Bibb. Rep. 453; Johnson v. Thompson, 4 id. 294; Key v. Walker, 7 Louis. Rep. 297; Boorman v. Johnston, 12 Wend. Rep. 567. See also 3 Phil. Ev., C. & H's. ed. §21-2.] And it has been repeatedly adjudged where a party has a right of recovery over, either by operation of law, or in virtue of an express contract, he may give notice to the person so reponsible, of the pendency of a suit against him, and if a judgment be obtained without fraud or collusion, it will be *conclusive* evidence for him against such person upon every fact established by it. The latter, then, cannot be viewed in the light of a mere stranger, but has the same means of controverting the adverse claim, as though he were the nominal and real party on the record.— [Bender v. Frombeyer, 4 Dall. Rep. 436; Hamilton v. Cutts, 4 Mass. Rep. 349; Leather v. Poultney, 4 Binn. Rep. 352; Witmer v. Schlatter, 2 Rawle's Rep. 204; Jacob v. Pierce, id.; Kip v. Bingham, 6 Johns. Rep. 158; Waldo v. Long, 7 id. 173; Barney v. Dewey, 13 id. 226; Bond v. Ward, 1 Nott & McC. Rep. 201; Clark's Ex'ors. v. Carrington, 7 Cranch's Rep. 322; Pinney v. Gleason, 5 Wend. Rep. 535; Tarlton v. Tarlton, 4 M. & S. Rep. 20; Curtis v. Ciska's Adm'rs., 1 Ohio Rep. 436; Walker v. Ferrin, 4 Verm. Rep. 523; Belden v. Seymour, 8 Conn. Rep. 304; Collingwood v. Irwin, 3 Watts. Rep. 306; Brewster v. Countryman, 12 Wend. Rep. 446.]

We have stated these principles as tests by which to deter-

Salle v. Light's Ex'rs, use, &c.

mine the sufficiency of the declaration. The first count alleges that the slave Ned, sold by the defendant to the plaintiff's testator, and by the latter to Lazarus, had been adjudged to be the property of Beale, in an action of detinue prosecuted by him against Lazarus. Now this may be true, and yet the title which the defendant conveyed to the testator, be superior to Beale's. It should, at least, not only be averred that Lazarus was *dispossessed by due course of law*, but that the recovery against him was under title paramount to that of the defendant. Such an allegation is the more especially necessary, as it cannot be intended from any thing stated, that the judgment in that action concluded the rights of any one else, than the parties to it. It may be assumed that it did not, and in a suit by Lazarus against the plaintiffs, the question whether the defendant's or Beale's title was the best, would be open, and could only be adjusted by proof extrinsic of the judgment in favor of the latter.

The second count is also defective. It deduces the liability of the defendant from the recovery of Beale against Lazarus, the satisfaction of that judgment by the latter, his reimbursement by the plaintiffs, and the notice of these facts by the defendant. If the plaintiffs had notice of the pendency of the action by Beale, and opportunity afforded to defend it, so that the judgment would have been conclusive of their want of title, then they might have discharged the judgment and sued the defendant. Such a state of things would have been equivalent to a payment under legal coercion. But even then, the question of title as between the plaintiffs and defendant, would be subject to the fullest examination.

It is perfectly clear, that the defendant's covenant with the plaintiff, was a matter not assignable under any statute of ours, and did not enure so as to give a right of action to any one who might subsequently become the purchaser of the slave. Whether the plaintiffs, upon being vouched by Lazarus to defend his title, could have called the defendant to their aid, and thus have made the judgment in favor of Beale conclusive of their right to recover of him, after they had satisfied Beale, is a question which does not arise upon the record; and will not, consequently, be mooted. In addition to the grounds on which this Court places the liability of the defendant, it should

Salle v. Light's Ex'rs, use, &c.

be alledged, that the plaintiffs were informed of the pendency of the suit against Lazarus, that they might defend the same; *and further*, that the title under which Beale claimed, was superior to that of the defendants.

From what we have said it will be seen that the third count is palpably bad. It merely affirms, that the defendant, at the time he made the bill of sale, had no interest in the slave, Ned, "but the true property was in one James A. Beale." This may all be true, and yet the defendants covenant be unbroken. There is no allegation of fraud on the part of the defendant to the plaintiff's injury, nor is it even averred that Beale has attempted to enforce his title. It is difficult to conceive of a right to recover damages, so long as the enjoyment of the property is unmolested. If the fact alledged be true, the plaintiff's testator might have dissolved the contract by an offer to return the slave to the defendant, and recovered the purchase money by suit, but it is not pretended such an offer was made, nor indeed can it be successfully.

It is unnecessary, after what has been said, to consider the effect of the arrangement between Lazarus and Mrs. Light, as evidenced by the writing. This will be discovered by an application of the principles stated. It may, however, be proper to remark, that if the plaintiffs can make out a right of action against the defendant, the release contained in that paper will not so inure to him as to defeat a recovery; but the measure of damages will not be the amount of Beale's judgment—it cannot exceed the injury sustained by the breach of the covenant.

We will not undertake to examine the defendant's pleas with particularity, as the pleadings will doubtless all be remodelled, if the case progresses farther. The pleas, with few exceptions, cannot abide the test of legal criticism, and most of them were apparently intended to meet the form of allegation adopted in the declaration.

Our conclusion is, that the judgment must be reversed and the cause remanded.

Bush v. McGee.

BUSH v. MCGEE.

1. An agent who purchases goods for his principal, which are, without the consent of the agent, seized by the sheriff, by virtue of an execution against the agent, in favor of a third person, and sold to satisfy the judgment, is a competent witness in a suit by the principal against the sheriff for the trespass.

ERROR to the Circuit Court of Mobile.

Trespass by the plaintiff against the defendant in error.

The defendant, sheriff of Mobile county, pleaded not guilty, and also a justification that he seized the goods by virtue of legal process, as the property of one Casper Albert, and that they were his property.

The plaintiff, to maintain his action, offered to prove by the deposition of Albert, that the plaintiff furnished him with money, as his agent, to go to Mobile and buy groceries, &c. for him, to be retailed in his store at Greensboro. That he accordingly went to Mobile, purchased the goods as such agent, and had them marked in the name of his principal. That these goods were seized by the sheriff, by legal process, at the suit of one P. Chantron, as the property of witness and sold, and the money applied in payment of Chantron's judgment, (who had indemnified the sheriff,) before his deposition was taken, and that the taking of these goods was the trespass complained of in this action.

The defendant objected to the reading of the deposition of Albert on the ground that he was interested in the event of the suit; this objection was sustained by the Court, and the deposition excluded. To which the plaintiff excepted. Judgment was rendered for the defendant.

The plaintiff now assigns for error the rejection of the deposition.

CAMPBELL, for plaintiff in error.

STEWART, contra, cited 1 Porter, 105; 4 id. 63.

Bush v. McGee.

ORMOND, J.—The only question presented on the record is, whether the witness, Albert, was interested in the event of the suit? The facts are, that he was furnished with money by the plaintiff to go to Mobile and purchase goods for him, and as his agent. That he purchased the goods accordingly, and that they were seized by the defendant, as sheriff, by virtue of an execution against the witness, and sold, and the proceeds applied to the satisfaction of the judgment against him—the sheriff having been indemnified by the judgment creditor.

The argument of the counsel for the defendant is, that as the debt of the witness has been paid by the sale of the goods, he is liable over to the plaintiff, and has therefore a direct interest in sustaining the action against the sheriff.

We are not informed what the precise character of the bailment in this case was, whether the agency was undertaken by the witness for the sole benefit of the plaintiff, or whether he was to receive a compensation for his services, and therefore beneficial to both. In the first case, he would only be responsible for gross, and in the latter for ordinary neglect; but in either state of the case we are unable to perceive, from the facts as stated on the record, any liability on the part of the witness to the plaintiff. The injury to the plaintiff, and loss of the goods, cannot, with any propriety, be ascribed to his negligence, or want of proper care and diligence. The levy by the sheriff, was an act he could neither control or prevent; it was in fact the *vis major* to which he could oppose no resistance, and for which, therefore, he should not be held responsible.

It is however, supposed that he is responsible to the plaintiff, because the product of the sale of the goods has gone in discharge of the judgment against him. If this be so, an implied assumpsit must be raised against him, by operation of law, in consequence of the payment of the judgment, without his consent and against his will. If the plaintiff had voluntarily paid the judgment, it is clear that he could not have maintained indebitatus assumpsit for the amount so paid against the witness, and certainly that would be as strong a case as the present, for an implied promise. In either case the judgment would be discharged and a benefit conferred on the witness; but in both there is wanting the essential ingredient to

Mialhi v. Lassabe.

constitute indebtedness on his part—his consent that the relation of debtor and creditor should be thus established.

It results from this view of the case, that the witness had no direct interest in the event of the cause; that he might have been biassed in favor of the plaintiff is more than probable; but this would have gone to his credit, and not to his competency.

The case of *Holman v. Arnott*, [4 Porter, 64,] is relied on by the defendant in error, as being directly in point. The facts were, that one Surber had sold to Holman a wagon, which was afterwards levied on by attachment, by Arnott, upon a debt due by Surber, and this Court held he was a competent witness for the plaintiff, because his interest was balanced between the attaching creditor and his vendee. The Court proceeded further, and say, that if the attaching creditor had obtained judgment, and the proceeds of the wagon had been applied in discharge of such judgment, he would then have been incompetent, because the judgment in the attachment was at all events, satisfied, but as he was still liable to his vendor, the equilibrium was destroyed. Admitting the law in this supposed case to be as stated, it is unlike this case, in this important particular, that here the witness was not the *vendor* of the plaintiff, but the mere agent, and does not appear to be in any way responsible to him.

Let the judgment be reversed and the cause remanded.

MIALHI v. LASSABE.

1. When a sum of money is paid in part performance of a verbal contract, for the purchase of land, and the purchaser files a bill for specific performance and general relief, the vendor, if he relies on the statute of frauds as a bar to the performance of the contract, will be decreed to repay the sum received, with interest, although by the void contract it was to be forfeited unless other payments were made at other periods. When the defendant elects to consider such a

Mialhi v. Lassabe.

contract as void, it is so in all its parts, and the vendor has no equity under such circumstances as will authorize an account to be taken of his losses, by reason of keeping the premises, contracted to be sold, unoccupied during the time he waited for the complainant to perform the contract, nor to have the same deducted from the sum received from the purchaser.

WRIT of Error to the Court of Chancery for the First District of the Southern Division.

The complainant seeks a specific performance from the defendant of a contract, for the sale of certain real estate, in the City of Mobile; and in the event, the defendant is unable to give the title contracted for, that the sum of five hundred dollars paid on the contract may be refunded.

The answer admits, that there was a verbal contract between the parties, but insists it was different from that set out in the bill. The contract admitted is set out, but the defendant insists on the statute of frauds, as a sufficient reason why performance should not be decreed. The answer also insists, that the complainant would not comply with the contract as it was actually made, and that afterwards the parties entered into a new contract, with reference to a part only of the premises owned by the first. By this new contract, the complainant was to pay five hundred dollars in cash, which was to be forfeited if the other terms were not complied with. Five hundred dollars was to be paid on the 1st October, 1836, when the defendant was to deliver the possession, and seventeen hundred and twenty-eight dollars in one year from that time. The answer denies, that the complainant ever performed any part of the original, or of the substituted contract, except the payment of the five hundred dollars, under the latter, and this sum the defendant insists, he is entitled to retain, under the substituted contract.

The defendant, in conclusion, pleads the statute of frauds, and insists upon it as a defence to the bill.

No evidence was taken on behalf of the complainant, and that for defendant does not prove that the five hundred dollars paid, was to be forfeited, if the other stipulations were not complied with. It does, however, establish, that several conversations were had between the parties, in which the plaintiff

admitted his inability to comply with the contract, and the defendant offered to return half the said sum paid, if the contract could be rescinded. The evidence also showed a matter not put in issue by the answer; that is, that the premises had remained without a tenant for fourteen months in consequence of the defendant waiting on the complainant to comply with the contract.

Under these circumstances, the Chancellor decreed, that an account should be taken of what the defendant had lost in consequence of the premises being without a tenant, and that the complainant should have a decree for the sum paid by him on the contract, with interest, after deducting the amount for rents lost.

The complainant prosecutes this writ of error, and insists, that the decree should have been for the non-payment of the money paid by him with interest.

STEWART, for the plaintiff in error.

CAMPBELL, contra.

GOLDTHWAITE, J. — It is, perhaps, necessary that we should advert to the principle on which the decree in this case is based, previous to considering the modification which the Chancellor gave to it, and in which we do not concur.

Ordinarily, when a bill is filed for a specific performance, and it is dismissed, nothing more is settled by the decree, than that the case is one in which equity will not interpose its extraordinary powers. But there are cases in which a decree may deny a specific performance, and also give relief, or great injustice would be the consequence. A case of this sort, of very ready comprehension, is when time is inserted as a condition, and a payment is made, which is to be forfeited if the purchaser does not make other payments within limited periods. In such a case the vendor at law is discharged from the contract, and possibly he may also be discharged in equity, but he clearly cannot in equity retain the money paid to him, any further than is necessary to save him harmless from all losses actually sustained. [Vernon v. Stephens, 2 P. Wms. 66; Mess v. Matthews, 3 Ves. Jr. 279.]

It is true, that here the complainant might have brought his action to recover the money paid, and thus have disaffirmed the verbal contract, but he was not bound to do so ; instead of that, he files his bill, and thus offers to the defendant either to comply with the verbal contract, or to rescind it by insisting on the statute as a bar. The defendant avails of the bar, and consequently there is no pretence for saying, that he can have any rights under the contract.

It is sufficient that the defendant elects to consider the contract as void ; after this the money is money received to the complainant's use, and there is no reason why he should be put to two suits ; one in equity to compel the defendant to perform the contract, if he will, and the other at law, to get his money back, after the defendant has, in effect, admitted that he has no claim to it. Let it be conceded that the rents have been lost in consequence of this contract, no injustice is done to the defendant, if the complainant is ready and willing to carry it out. But when the defendant declines to do this, there is no color for him to assert that he is injured by the contract not having been complied with.

When he refuses to execute it, the presumption is equally reasonable that the appreciation in value of the property contracted for, is more than equivalent to the loss sustained by its remaining unoccupied.

The decree must be reversed, and here rendered in favor of the complainant for five hundred dollars, with interest from the thirty-first of August, 1836, the time when the money was paid.

MCMILLAN, ET AL. v. GORDON & STODDARD.

1. Where a suit was pending for the foreclosure of a mortgage, and a sale of the premises, the solicitor of the complainants, with their approbation, received of a friend of the mortgagor a part of the debt intended to be secured, agreeing that he should *pro tanto* have a lien on the mortgaged property. Held, that the arrangement made the friend, thus advancing money, an assignee in equity, to the extent of the sum advanced; that the mortgagor, or a junior incumbrancer, upon taking an account, could not avail themselves of it as a partial extinguishment of the debt; and *further*, that the friend was not a necessary party to the bill.

WRIT of Error to the Court of Chancery sitting at Mobile.

The defendants in error filed their bill for a foreclosure of a mortgage, which had been executed on real estate, situate in the City of Mobile, for the payment of a debt of about four thousand dollars, owing to them by the plaintiff McMillan. From the bill as amended, it appears, that since the execution of the mortgage, McMillan, the mortgagor, had sold and conveyed the mortgaged premises to Thomas Irvin, who, since the service of the *subpœna* in this case, has died, leaving a will, in which ——— of Mobile is appointed executor, (who has duly qualified,) and Richard Irvin, of New York, sole heir and devisee. McMillan, Richard Irvin, and Daniel Wheeler are made defendants; and afterwards, by consent of parties, Geo. W. Heard, James Haughton, and Theodore P. Hale, doing business under the style of James Haughton & Co., were made parties defendant. Afterwards Haughton & Co. filed their cross-bill against the complainants and the other defendants, with the exception of Daniel Wheeler, setting up a junior incumbrance upon the mortgaged premises, and praying a foreclosure and sale. Haughton & Co. also answered the bill of the complainants, admitting they had understood something was due upon complainants' mortgage, &c.

At a term of the Chancery Court, holden in April, 1842, a reference was made to the Master, to ascertain and report the state of accounts. And immediately thereafter a report was made, embodying the evidence adduced before the Master, and

stating the amount due on complainants' as well as Haughton & Co.'s mortgage. Exceptions were filed by both parties, which were overruled, and a decree rendered in conformity to the report.

The only question raised is, whether nine hundred and fifty dollars and twenty-five cents, paid by the attorney of the complainants, to them or their order, is to be considered as extinguishing *pro tanto* their mortgage. So much of the evidence as may be material will be here stated.

Gustavus Horton states, that, as the agent of complainants, he received at different times since the institution of this suit, viz: between February 15th, and December 29, 1841, both inclusive, nine hundred and fifty dollars and twenty-five cents of J. G. Aiken, and remitted the same to complainants, as money paid by Mr. Aiken, as their attorney, on collections made upon the notes secured by the mortgage.

J. F. Adams deposes, that he heard the complainant, Stoddard, state to one of the firm of Haughton & Co., that there was due on the mortgage sought to be foreclosed, between twenty-one and twenty-two hundred dollars. He also heard him say, that he had never authorized any one to assign their interest in the mortgage; that they had received remittances from their agents on the mortgage in payment, and that the amount above stated, was about what was due. These remarks were made by Mr. Stoddard between the first of June and first of September, 1841.

J. G. Aikin, the solicitor of the complainants, deposes, that he was their attorney, and had authority from Dr. Shaw, their agent, to collect the money and manage the suit as he thought fit; and complainants in one of their letters say to him, "that they do not wish even to appear to interfere with the instructions given witness by F. Shaw & Co." The witness in his his solicitude to raise some part, or all of what was due on the mortgage, induced McMillan to get his friend John King to advance the money paid by witness to F. Shaw & Co., and forwarded by the latter to the complainants, on the assurance that a lien on the mortgaged premises should be given to King for his advances, and the amount should be refunded out of the proceeds of the sale. McMillan paid the money to the witness in the name of John King, and the witness acknowledged

in a receipt, that the payment was made by the latter, and was to be refunded out of the proceeds of the sale.

It was the intention of the witness, and he thinks he so informed F. Shaw & Co., at the time he paid them the moneys, that they were not paid by McMillan, or for him, but by another individual.

Witness did not inform the complainants how he had raised this money, until after the conversation of Stoddard, as related by Mr. Adams ; when, learning that they had misapprehended the matter, he informed them what had been done, and stated, if the arrangement met their approval, more money, and perhaps all due on the mortgage might be raised. That the suit for a foreclosure and sale would still progress, as if the money had not been paid, &c. In answer to the letter communicating this information, the complainants say, "in your letter of October 31st, which, by the way, was perfectly satisfactory, you say our debt is amply secured, but we suppose we shall not realize the whole of it before next September, in case we wait the issue of the suit. As we mentioned to you, Messrs. Haughton & Co. are our friends and neighbors, and we wish to favor them all we can in this matter."

Witness considered the payments made by him to Shaw & Co., as a mere matter of account between witness and complainants, and not affecting in any way the amount of the mortgage debt. But the receipt of the money paid Shaw & Co. was from McMillan, who represented himself as the agent of King.

ADAMS, for the plaintiffs in error. The nine hundred and fifty dollars twenty-five cents, whether advanced by McMillan or King, is a payment *pro tanto*. [1 Porter's Rep. 423.] But the proof shows that this money was paid by McMillan ; at any rate, that it was so received by the complainants.

The solicitor or attorney at law of the complainants had no power to assign the mortgage, or to stipulate with King, that he should stand in the place of the mortgagees, and have a lien for money which he might advance as the friend of the mortgagor. [5 Vern. Rep. 346 ; 1 Bailey's Rep. 437 ; Gallett v. Lewis, 3 Stew. Rep. 23 ; Kirk v. Glover, 5 Stew. & P. Rep. 340 ; Craig v. Ely, *id.* 354. See also 1 Porter's Rep. 212.]

No counsel appeared for the defendants.

COLLIER, C. J. — The facts stated in the two affidavits first recited in the record, unexplained by what Mr. Aikin deposes, would lead to the conclusion that the moneys paid by him were intended *pro tanto* to extinguish the mortgage ; but his affidavit very satisfactorily repels any such inference. Mr. A. states, that the instructions given him by F. Shaw & Co., the agents of the complainants, made him anxious to raise the amount due on the mortgage, or some part of it, as soon as possible ; and, without waiting a foreclosure and sale, he induced the defendant to procure his friend, John King, to make an advance for him, under an assurance that he should be reimbursed from the proceeds of a sale of the mortgaged premises ; that the advance was made and paid over to the agents of the complainants, and that the latter, when advised of the circumstances, approved of the manner in which the collection was made ; that the money was received by Mr. A. of McMillan, as the agent of King, and was considered by him as a mere matter of account between himself and the complainants.

These circumstances do not, in our opinion, show that the mortgage became inoperative to the extent of the moneys paid, but rather that King became assignee in equity, and was entitled to the benefit of the mortgage thus far, as a means of securing the repayment of his advance. It is certainly competent for all the parties to a security of this nature, to agree that if a third person has or shall advance money to the mortgagee, he shall stand in the situation of an assignee, and enjoy all the rights of his assignor. To consummate such an arrangement, it is not necessary that it should be evidenced by writing, but will be effectual in a court of equity, though it be verbally made. In this view of the case, the only question is, can a decree be rendered in favor of the complainants, for the amount due, including the advance by King, or in order to the recovery of the latter sum, should King have been joined as a party ? The bill was filed by the proper complainants, and to have associated King with them, would have made it demurrable ; for his interest did not accrue until his money was paid to Mr. Aikin, which, we have seen, was subsequent to the institution of

the suit. In *Cook v. Mancias*, (5 Johns. Ch. Rep. 89,) a trustee and *cestui que trust* filed a bill in equity, and pending the suit, the *cestui que trust* assigned his interest to another; the question was, whether the assignee should not have been made a party. The Chancellor said: "A change of interest from the *cestui que trust* to another, *pendente lite*, can hardly be admitted as sufficient to support the objection at the hearing, of a want of parties, when we have before us the party in whom the legal title resides, and the *cestui que trust* existing at the filing of the bill. The Court is not bound to take notice of any interest acquired by purchase in the subject-matter of a suit pending the suit."

In the present case, the specific objection of a want of proper parties, has not been made either at the hearing or in this Court. If it had been, it could not be sustained, if the case cited is to be regarded as an authority. Here, according to the view taken, the complainants are trustees for King to the amount of his interest, and being the only proper parties when the bill was filed, are entitled to a decree not only for what is due them in their own right, but for what is legally due to them for King's benefit.

Whether we consider the decree with reference to its amount or the parties to it, it is free from error, and must be affirmed.

GIBBS & LABUZAN v. FROST & DICKINSON.

1. A bond signed in blank may be afterwards filled up in a material part, by the express authority of those who are to be bound by it, and will be as valid as if filled up before it was executed. Such authority may be by parol. An authority to fill up and perfect the bond is an authority to redeliver it also.
2. When two or more persons have a common object in view, the declarations of one in the presence and hearing of all, in furtherance of the common purpose, and uncontradicted by them, must be considered as the declaration of all. Therefore, when L., against whom four judgments had been obtained, and execution issued thereon, went to the clerk's office with two other persons as his

intended sureties to obtain writs of error to the Supreme Court, and to execute bonds to supersede the executions, which the Clerk commenced preparing by proceeding to fill up the blanks kept in the office for that purpose, when L. interposed, and in the presence and hearing of his sureties, stated that he had not time to wait until the bonds were filled up, and requested that they might be executed in blank, by him and his sureties, which was accordingly done, and a statement handed to L. that the executions were superseded—Held, that this was an express authority to the Clerk to fill up the blanks in the bond, both on the part of the principal and the sureties.

3. An authority to perfect a bond by filling it up, given by parol, may be revoked in the same manner, and if revoked before the bond is perfected, the authority to perfect it, is at an end.
4. A blank writ of error bond will not operate as a supersedeas to the execution.
5. When it is necessary for a party to a bond, which, by statute, has the force and effect of a judgment, to resort to a Court of Chancery for relief against the bond, on the ground that it is not binding on him, the question will be considered in Chancery, as if it had arisen at law, upon the appropriate pleas. In such a case, Chancery is the appropriate forum to obtain relief.
6. A denial of the facts of the bill, by a party who is not charged with knowledge of them, and who in fact has not knowledge of them, will not cast on the complainant the necessity of establishing their truth by two witnesses.

ERROR to the Chancery Court at Eutaw.

The bill which was exhibited by the plaintiffs in error, charges that the defendants in error obtained a judgment against one John Lunsford, upon which he was desirous to prosecute a writ of error to the Supreme Court, and obtain a supersedeas thereon, and applied to the plaintiffs in error to become his sureties to the writ of error bond. That pursuant thereto they with the said Lunsford signed the printed skeleton of a writ of error bond, in which the *penalty, the parties, the judgment to be superseded, and its amount*, were left blank. That at the time of signing the instrument, nothing was said about its being imperfect, and no authority was given to the Clerk to add to, or in any manner to alter the same. That on the next day, ascertaining that all the property of Lunsford had been levied on by other executions, and that he could not secure them against liability, as he had fraudulently promised to do, and that the bond was yet incomplete, one of the plaintiffs in error, for himself and the other, directed the Clerk not to fill up and complete the bond. Yet the Clerk, after the lapse of some months, proceeded to fill up the bond, and did fill it up. That when the Clerk was directed not to fill up the bond, he

Gibbs & Labuzan v. Frost & Dickinson.

wrote to the sheriff to return the supersedeas which had been issued to the office, but the sheriff refused, and returned the execution stayed by writ of error.

The said cause being carried to the Supreme Court by Lumsford, was there affirmed against him, and the plaintiffs in error as his sureties, and execution has now issued against them on the affirmed judgment. They pray an injunction, which was granted.

The defendants in error, who are non-residents, answer the bill, and deny all knowledge of the allegations of the bill concerning the writ of error, except what they have derived from the information of their counsel; but aver that the plaintiffs in error, or one of the obligors in the bond, in the hearing of all, and with their consent, did authorize the Clerk to fill up the bond, in the manner and to the effect that the same was filled up, and that the Clerk, in afterwards filling it up, acted pursuant to the license and authority thus given him by the plaintiffs in error, but admit that the Clerk received the instrument in blank, and thereupon superseded the execution, which was placed in the sheriff's hands, who thereupon sold the property levied on by virtue of the execution so superseded, and applied the proceeds in discharge of executions of inferior grade. They demurred also to the bill.

Price Williams, the Clerk of Sumter County Court, being examined as a witness, stated that the bond as executed by the parties was in the form following:

Frost & Dickinson,	}	Error bond—\$479 18.
vs.		
John Lunsford.		

The State of Alabama—Sumter County:

Know all men by these presents—that we, ————, are held and firmly bound unto ————, his heirs, executors or administrators, in the sum of ———— dollars, for the payment of which we jointly and severally bind ourselves, our heirs, executors or administrators, firmly by these presents, sealed with our seals, and dated this 8th July, 1840.

The condition of the above obligation is such, that whereas, the above bound ————, this day applied for and obtained a

Gibbs & Labuzan v. Frost & Dickinson.

writ of error, returnable to the January term, 1841, of the Supreme Court of Alabama, to supersede and revise a judgment recovered by the said ———, plaintiff, against ———, defendant, at the ——— term, 184—, of the County Court of said county of Sumter, for the sum of ———. Now if the said ——— shall prosecute to effect his said writ of error, in the Supreme Court, and shall pay and satisfy such judgment as the Supreme Court shall render in the premises, then this obligation to be null and void, otherwise to be and remain in full force and virtue.

JOHN LUNSFORD, (seal.)

BART. LABUZAN, (seal.)

CH. R. GIBBS, (seal.)

Signed, sealed and acknowledged before me,

PRICE WILLIAMS, Clerk.

“That the reason why the bond was taken partly filled up, and partly in blank, as shown in the exhibit, was at the special instance and request of Lunsford, made in the presence and hearing of Gibbs and Labuzan, who interposed no objection, Lunsford saying at the time that he was compelled to return to Gainesville on the evening of the execution of the bond, (it being then late in the afternoon,) to stop the sheriff from selling his property—that he considered the request of Lunsford express authority by Lunsford, Gibbs and Labuzan (the latter making no objection,) to fill up the blank. That they came to his office for the purpose of signining this and four other bonds for writs of error to the Supreme Court—that when he commenced filling up the bonds, Lunsford, in the presence of the others said he had not time to wait for him to fill up the bonds, as he had to ride eighteen miles to Gainesville that evening, and that the bond in this and four other cases, was then prepared, executed and delivered, as shown in the exhibit.”

He further stated on cross examination, “that some few days after the execution of the bonds, and before the blanks were filled, that Labuzan came to him at his office, and in his own behalf, and in behalf of Gibbs, requested that the blanks in said bonds should not be filled up, for the reason that Lunsford had failed to give him a deed of trust to secure them, as

he had promised. That he refused, considering the bonds as good as though they had been filled up at the time they were signed." And further, "that Labuzan requested him, as Clerk of the Court, to write to the sheriff to disregard the statement sent to him in this and four other cases, which he refused to do, regarding it, under the circumstances, as good as a regular writ of supersedeas, but informed Labuzan he would write to the sheriff for him, and did so."

Much other testimony was taken which it is not necessary to notice.

The Chancellor, at the hearing, refused to sustain the demurrer to the bill for want of equity, but sustained it because the Clerk was not a party, and upon the bill, answer and proof dismissed the bill with costs, *pro forma*, that the cause might be heard in the Supreme Court.

From this decree this writ is prosecuted.

THORNTON, for plaintiffs in error, contended, that the proof of the Clerk showed that no express authority was given to fill up the blanks in the bond, but that it was implied from the silence of the parties when they executed the blank bonds. That as the bond was a nullity until it was filled up, that even an express authority to perfect it, was not sufficient without a redelivery. He cited 5 Munroe, 31; 2 Brock. 72; 2 Lomax, 21; 1 Yerger, 69; 6 Gill and Johnson, 254.

He insisted that the case relied on from 5th Mass. 540, was the case of an immaterial alteration, and that in such cases consent may be implied.

That before the authority, express or implied, was exercised, it was revoked, and that the bond was afterwards filled up without any authority whatever.

BLISS and METCALF, contra, contended that the Clerk should have been made a party, and that the demurrer to the bill was properly sustained for this cause. [1 Story Pl. 74, 137; 4 Peters' Rep. 190; 2 Stewart's Rep. 233; 1 Ala. Rep. N. S. 708; 2 id 209.]

That there was a full and adequate remedy at law. [2 Chitty's Practice, 354; 10 Mass. 101; 5 Rand. 639; 2 Leigh, 361; 6 id. 547; 5 B. and A. 187; 1 Johns. 529; 4 id. 191; 17 id.

474; 2 Wash. 54, 9 Porter, 679; 1 Ala. N. S. 98; 7 Porter, 549.]

That if equity has jurisdiction its aid should have been invoked before judgment. [7 Porter, 549.]

That the bond having been signed with the intent that it should be filled up, gave the Clerk an implied authority to fill it up. [5 Mass. 538; 6 id. 519; 4 McCord, 239; 2 Dana, 142; 17 S. and Rawle, 438.]

That the evidence showed that express authority was given, which was clearly sufficient. [2 Levinz, 35; 1 Anstruther, 228; 4 Com. Dig. 294, F.; 5 Mass. 538; 6 id. 519; 14 S. and R. 405; 17 id. 438; 4 Johns. 54; 2 Brock. 64; Story on Agency, 52; Story on Partnership, 176; 11 Pick. 400; 19 Johns. 513; Greenleaf on Ev. 602; 1 Green. Rep. 334; 6 Cowen, 59; Sid. 118; 9 Cranch, 28; 1 Stewart, 517; 1 Ala. N. S. 18, 429; 2 Poth. on Ob. 138; Hurlston on bonds, 121.]

That the attempt to revoke came too late, as the executions were superseded. [Story on Agency, 487.]

Lastly, that the equity of the defendants is superior to that of the plaintiffs. [2 J. J. Marshall, 400; 1 Story's Com. on Eq. 75, 76.]

ORMOND, J.—Several preliminary questions are presented, which it will be proper to consider before entering on the merits of the case.

First—It is supposed by the counsel for the defendants in error, that as this is a proceeding in Chancery, the liability of the plaintiffs in error will depend on different principles, from those which would govern if the question had been made at law. This view cannot be supported. The statute of this State has given to bonds, executed to supersede a judgment on writ of error, and to many others of a kindred nature, upon forfeiture, the effect of a judgment. This forfeiture is declared *ex parte*, by the Clerk or sheriff, and execution issues thereon immediately. If, by being compelled to resort to a Court of Chancery to vacate a bond, by which a party is not bound, but to which the statute has given, *prima facie*, the force and effect of a judgment, he loses any right secured to him by the common law, the statute would be unconstitutional. This is the view which has always been relied on in this State, to sup-

port the statutes giving to these bonds the force of judgments, without a jury trial; as was held by this Court at the last term, in the case of Perkins v. Mayfield and wife. The question must, therefore, be considered here, as if it had arisen at law, upon the appropriate pleas.

Second—It is also maintained by the defendants' counsel, that as the material allegations of the bill are denied, they must be established by the proof of two witnesses, or by one with corroborating circumstances. The rule is as stated, but does not apply where the defendant has no knowledge, and is not charged with having any knowledge, of the facts alleged; as where the bill is filed against an executor, upon allegations of facts not within his knowledge. In such a case, if he should venture to deny the allegations of the bill, the only effect of such denial, would be, to put the complainant on proof of the fact.

In this case the facts are not charged to be within the knowledge of the defendants, nor is it stated that they were privy to the acts of the Clerk. In their answer they admit they know nothing of the facts but from the information of their counsel. The answer was doubtless not intended as a denial of the facts stated in the bill, but rather as a denial of the conclusions of law adduced from the admitted facts. But be the intention what it might, it cannot, under the circumstances, bring the case within the rule which the counsel have invoked.

Third—The principal question in the cause is, whether the bond executed by the plaintiff in error, in blank, is operative as their deed?

It is admitted that the skeleton, or mere office form, which was executed by them, is not obligatory as a writ of error bond, as many of the most essential parts of the bond were omitted at that time to be inserted; but it is contended that authority was given to the Clerk, by the parties to it, at the time of its execution to fill it up and perfect it. That this authority may be implied from the circumstances of the case, the object and purpose of the parties, and their consent at the time of its execution, that the instrument should subserve the purpose for which it was designed. That if wrong in this, the evidence shows that express authority was given to the Clerk to perfect the bond.

The counsel for the plaintiffs in error denies that express authority was given to the Clerk by the plaintiffs in error, to perfect the bond, but that such authority, if any exists must be implied; and that even if express authority was given to fill up the blanks, as the addition was a material part of the instrument, without which it could not operate as a bond, that it would avail nothing without a redelivery, which is not pretended to have taken place.

The only witness who has any knowledge of the facts relating to the execution of the bond, Price Williams, the Clerk, testifies, that several judgments had been obtained against one Lunsford, in his Court, among which was the one in favor of defendants in error. That Lunsford and the plaintiffs in error, as his intended sureties, came to his office, for the purpose of suing out writs of error to the Supreme Court, in all the cases, and executing bonds to supersede the executions which had issued on the judgments—that he commenced filling up the blank bonds, or printed forms kept in the office, when Lunsford interposed, stating that it was then late in the afternoon, and that he had to ride eighteen miles to Gainesville that night, to stop the sheriff from selling his property, and had not time to wait till the bonds could be filled up; and at his special instance and request, it was executed in blank, by him and by the plaintiffs in error, as his sureties, who were present at the time and interposed no objection, the whole matter passing in their presence and hearing. That in pursuance of the authority thus given, at a subsequent time he filled up the blanks in the bond.

We think it impossible to doubt that this was not an express authority on the part of Lunsford to the Clerk, to perfect the bond by filling the blanks, and the only question on this part of the case is, whether it was also an express authority conferred by his sureties. In our opinion it was. When two or more persons have a common object in view, the declarations of one in the presence and hearing of all, in furtherance of the common purpose, and uncontradicted by them, must be considered as the declarations of all.

It could subserve no rational purpose in such a case to require each of the contracting parties to repeat over what one had just said on behalf of all, to which there was no dissent,

but to which they all assented, by carrying the proposed design into effect, so far as their co-operation was necessary. Nor in the ordinary concerns and business of life would such a senseless repetition ever be resorted to, or required. The rules of evidence are practical, and founded upon the usual and customary conduct of men in the ordinary pursuits and business of life. Judged by these rules, we are satisfied that the parties intended at the time to be understood by the Clerk, as speaking through Lunsford, their principal, and when the proposition was assented to by the Clerk, they showed their understanding of it, by carrying it into effect on their part.

Considering then, as we do, that there was an express authority delegated to the Clerk to perfect the bonds by filling them, we are next to inquire whether a bond so filled up, is binding on the obligors as their deed, without any further act on their part.

Without entering on the inquiry, whether an authority to alter a bond in a material part, may not be implied from circumstances, we are satisfied that the authorities cited by the counsel for the defendant in error, establish beyond all doubt, that a bond may be altered in a material part by the authority of the obligor expressly given for that purpose, and that such authority may be by parol. The question is most elaborately considered by C. J. Marshall, in the case of *The United States v. Nelson and Myers*, [2 *Brockenbrough*, 64,] in which the leading English and American cases are considered, and he attains the conclusion that a bond may be altered by the express authority of the parties to be bound thereby, but that such consent cannot be implied. See also, *Wiley v. Moore*, 17 *Ser. & Rawle*, 438; *Wooley v. Constant*, 4 *Johns.* 54. *Speake v. The U. States*, 9 *Cranch*, 28; 6 *Cowen*, 59; *Ex parte Decker*, *Boardman v. Gow & Williams*, 1 *Stewart*, 517; to which a great many other cases might be added.

It was, however, strenuously maintained, that after such alteration of a deed, by express authority, there must be a redelivery, and as no deed can take effect without delivery, such is doubtless the law. The fact of delivery, however is usually inferred from other circumstances. It rarely happens that when a deed is delivered, it is formally placed in the hands of the obligee, with the declaration that it is delivered. The

mere permission of the obligor to the taking possession of the deed by the obligee, is a delivery, and is so laid down in the books. When, therefore, an authority is conferred on one to perfect a deed by filling it up, he must of necessity have the power of consummating the act by a delivery, otherwise his authority is nugatory. Thus in one of the oldest cases on this subject, *Texira v. Evans*, cited and relied on in *Master v. Miller*, [1 Anstruther, 229,] the point appears to have been thus ruled. The case is thus stated—Evans wanted to borrow four hundred pounds, or so much of it as his credit would be able to raise; for this purpose he executed a bond with blanks for the name and sum, and sent an agent to raise money on the bonds. *Texira* lent two hundred pounds upon it, and the agent accordingly filled up the blanks with that sum, and *Texira's* name, and delivered the bond to him. On *non est factum*, Lord Mansfield held it a good deed. We do not learn from the case that there was an express authority to deliver the deed, but that it was implied or perhaps to speak more correctly, included in the general power, as otherwise the power could not be effectuated.

It appears further from the testimony of Mr. Williams, that one of the plaintiffs in error, a day or two after the blank bond was executed, called on him, and for himself and on behalf of his co-surety, requested that his bond should not be filled up, which the Clerk declined to accede to, considering the bond in its then condition, as obligatory as when perfected by filling up; and had in consequence sent the sheriff a statement that the executions were superseded, and that he had no further power over the subject, except to complete the bond.

A parol power to do an act may be revoked by parol before it is executed; nor was it contended that the authority conferred on the Clerk by the plaintiffs in error, to perfect the bond, was in its nature irrevocable; but it was argued that as the Clerk had commenced the execution of the power, by notifying the sheriff that the execution was superseded, whereby the defendants in error were prejudiced, the power of revocation was gone. This position is doubtless correct, if the facts are as the argument supposes. But the *supersedeas* is not the act of the Clerk, but the legal consequence of the bond. The statute declares that when bond and security are given according to

law, the writ of error shall operate as a *supersedeas*. [Aik. Dig. 255, §8.] Until the Clerk executed the power conferred on him, by filling up and perfecting the bond, it was a nullity, and could not in any manner affect the execution. The argument that the premature action of the Clerk, notifying the sheriff that the execution was *superseded*, was a commencement of the execution of the power, can only be supported on the idea that the bond in its imperfect state was operative, because the Clerk had the power to perfect it; or in other words, that the mere power to execute the bond, was, in law, the bond. Whether the bond would not have related back to the time when the blanks were executed, if the power had been exercised before it was countermanded, it is not necessary now to determine; but the power having been revoked before it was exercised, is as if it never had existed.

Much has been said in the argument about the consequences of a decision in this case, against the validity of the bond. If it be true, as supposed, that our Clerks are in the practice of superseding executions on blank bonds, it is time they were distinctly admonished that such a practice is without legal authority, and that they consult their safety and security only by keeping within the pale of the law. The consequences to which a position may lead may be, and frequently is, persuasive of its unsoundness; but when the law is plain and undoubted, we cannot hesitate to enforce it, from an apprehension of the consequences which may result from its having been disregarded.

4. It remains to consider whether the Clerk should have been made a party to the bill.

In the case of *Lockhart v. McElroy*, at the present term, we held that for any abuse of the process of the Court, the Courts of common law could render summary justice upon equitable principles, on motion, and to attain the object, might supersede the execution during vacation. But in a case like the present, such relief could not with propriety be granted. The Clerk is directly interested in this controversy, and complete justice cannot be done unless all parties in interest, or who are responsible, are before the Court, as otherwise they are not concluded by the litigation. This point was thus ruled in the

Mann v. Bissent et al.

case of *Brooks v. Harrison*, [2 Ala. Rep. 209,] a case which cannot be distinguished from this.

But the bill should not have been dismissed for this cause, but permitted to stand over, that the Clerk might be made a party. The decree of the Chancellor dismissing the bill must be therefore reversed, and the cause remanded for further proceedings. But this is not considered a proper case for costs; each party will therefore pay his own costs in this Court.

MANN v. BISSENT ET AL.

1. The act of 29th May, 1830, confers certain rights of pre-emption, but by its third section, declares all assignments, &c. of the right to be void if made before the patent issues. The supplemental act of the 23d January, 1832, removes the restriction and permits the pre-emptor to assign and transfer his certificate of purchase. The act of 19th January, 1834, revives the first act, and continues its provisions, for the benefit of those entitled to pre-emption, in force for two years, but is silent with respect to the revival of the supplemental act. *Held*, that a pre-emptor under the act of the 19th January, 1834, was authorized to transfer his certificate of purchase, and may be compelled to transfer the legal title vested in him by the patent, to a purchaser to whom he had assigned the certificate immediately after the entry. And that a purchaser from the pre-emptor, with notice of the assignment, will be compelled to convey the legal title vested in him by conveyance from the pre-emptor, to him who has the equitable right under the assignment of the certificate.

WRIT of Error from the Court of Chancery for the Second District of the Southern Division.

The case made by the bill is as follows: On the 3d September, 1834, Bissent, the defendant, entered at the Land Office at Montgomery, the west half of the north-east quarter of section nineteen, township ten, range twenty-eight. Mann, the complainant, purchased the land from Bissent, for two hundred dollars, which was then paid, and the certificate of pur-

chase was transferred by Bissent to Mann, by an indorsement in these words: For value received I hereby transfer all my right title and interest to the land within described, to William B. Mann, his heirs and assigns, for value received. September 3d, 1834.

This was signed by Bissent and witnessed by W. Deshazo.

After the patent had issued in the name of Bissent, he refused to convey.

The bill prays that Bissent may be decreed to convey title, &c.

Afterwards a supplemental bill was filed, which recites the principal matters of the original bill, and alleges that since its exhibition Wilson Deshazo, claiming to be the agent of Robert Deshazo, had purchased, or pretended to purchase, the said land from Bissent, and taken a conveyance from him to Robert Deshazo. who afterwards instituted suit against a tenant of the complainant to recover the land. It also alleges that Wilson Deshazo, the agent making this purchase, is the witness to the transfer, and that both had full knowledge of the transfer. This bill has the additional prayer, that Deshazo may be enjoined from prosecuting his suit against the tenant of Mann, then in possession, &c. and that the deed from Bissent to Robert Deshazo may be set aside.

The answer of the defendants admits the principal facts stated in the bill, but assert the consideration of the transfer of the certificate to have been, one hundred dollars paid at the time of entry, and one hundred dollars agreed to be paid by Mann the Christmas afterwards; that it was also agreed that Mann should permit Bissent to occupy and cultivate a field of ten acres of the land, for the year 1835, and afterwards should permit one Blades to cultivate the same field for the years 1836, '37 and '38. That Mann has not permitted Bissent or Blades to retain possession of this field, and for this reason the former refused to convey the land to Mann, and afterwards sold it to Wilson Deshazo, as the agent of Robert Deshazo, for three hundred dollars, which has been all paid except ten dollars. Notice is admitted by Wilson Deshazo, but denied by Robert.

The defendants afterwards filed a supplemental answer, in which they set up, that the transfer by Bissent of the certificate of purchase was void, inasmuch as the land entered under the

pre-emption act of 1834, which revives the act of 1830, by which all transfers are prohibited and made void if made previous to the issuance of the patent.

The evidence taken in the case establishes the contract as asserted in the answer, but shows a relinquishment by Bissent of his right to remain on the land. The payment of the consideration is fully proved.

The Chancellor considered the contract as invalidated by the provisions of the act of Congress of 29th May, 1830, and accordingly dismissed the bill.

LEWIS, for the complainant and BUFORD, for the defendants, submitted the case, both conceding that the only question in it was, the construction to be given to the act of 19th January, 1834, as reviving the previous act of 29th May, 1830, with or without the supplemental act of the 23d January, 1834.

GOLDTHWAITE, J.—The act of Congress of the 29th of May, 1830, confers certain rights of pre-emption on the settlers upon the public lands, but declares all assignments and transfers of the right to be void, if made prior to the issuing of the patent. This act was to remain in force only one year from its passage. [Land Laws, vol. 1, 474.] On the 23d January, 1832, another act was passed, entitled “an act supplementary” to the one before mentioned; and this provides that from and after its passage, all persons who have purchased under the former act, may assign and transfer their certificates of purchase, or final receipts, and patents may issue in the name of such assignee, any thing in the former act to the contrary notwithstanding. [1 Land L. 492.] The act of Congress of the 19th January, 1834, revives the act of 1830, and continues it in force for two years, but is entirely silent with respect to the supplementary act before recited. The only question in this case is, whether a pre-emption purchaser, under the last act is prohibited from assigning his certificate before he has obtained the patent.

The supplemental act, in our opinion, must be construed as conferring a distinct and independent right on the pre-emptor. By the act of 1830, he is entitled to purchase the land, and by

the supplemental act he is authorized not only to sell it, but so to transfer it that the patent shall issue to his vendee. When, therefore, the act of 1830 was revived, by the subsequent act of 1834, the rights of the pre-emptors under the latter act, were at once governed by the supplemental act. Without doing violence to any rule of construction, the supplemental act may be considered as a legislative exposition, or enlargement of the original act, and when that was revived, all the consequences growing out of the exposition, or enlargement, immediately attached.

As this is the only question in the case, and as the decree is not in conformity with the opinion now expressed, it must be reversed, and here rendered, that Robert Deshazo be perpetually enjoined from prosecuting his action against Duncan Fulton, the complainant's tenant, for the recovery of the land named in the pleadings; that his title to the same, derived from the defendant, Bissent, be set aside and declared null and void; and that all the title of the said defendant, Bissent, be declared vested in the complainant. As the defendants Deshazo are chargeable with notice, and the proofs show a clear case of confederacy, the costs of both Courts are decreed against the defendants jointly.

MANSONY AND HURTELL v. THE UNITED STATES BANK AND ITS ASSIGNEES.

1. The mortgagee of land entitled to the possession, or to the rents, may recover of a tenant holding under a lease from the mortgagor, the rents accruing subsequent to the time when the former become entitled; unless previous to the notice the tenant paid them to the mortgagor; and in such cases the statute dispenses with the necessity of attornment.
2. Where a judgment at law is enjoined, upon the complainant executing a bond with surety, the injunction suspends the lien of the judgment.
3. *Quere?* Is not an original, or *alias fieri facias*, issued after the defendant's death, a nullity as it respects the lands of which he died the proprietor.
4. An order appointing a receiver in a case in Chancery, and directing an attachment to issue against certain tenants, in possession of a part of the property in question, unless they attorned to the receiver within a prescribed time, is not such a final order or decree as can be reviewed on writ of error, while the cause is pending in the Court of Chancery.

WAIT of Error to the Court of Chancery sitting at Mobile.

In the cause out of which this case arises, three bills have been filed; the first at the suit of Jos. Cowperthwaite, Thos. Dunlap and Herman Cope, against Isaac H. Erwin, as administrator *cum testamento annexo* of Henry Hitchcock; in the second, "The President Directors and Company of the Bank of the United States," a corporation of the State of Pennsylvania, is added as a complainant, and the widow of Mr. H. and her children, all of whom are infants, are joined as defendants; and in the last, the names of the complainants in the first bill are prayed to be stricken out, and in their stead the assignees of the Bank are stated by name, and prayed to be joined with the corporation as complainants. From the several bills considered together, it appears that Henry Hitchcock, late of Mobile, was on the fourth day of July, 1838, indebted to "The President Directors and Company of the Bank of the United States," in the sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents. To secure which sum Mr. Hitchcock and wife, on that day, executed to Joseph Cow-

Mansony and Hurtell v. The United States Bank and its Assignees.

perthwaite, Thomas Dunlap and Herman Cope, a deed of mortgage on a large and valuable real estate, situate in the city of Mobile; conditioned to be void, if the debt intended to be secured should be paid at certain periods prescribed by the deed. Mr. Hitchcock in his lifetime having failed to pay one of the instalments which first became due, the mortgagees filed their bill in Chancery for a foreclosure of the mortgage. To this bill the mortgagor answered, setting up a defence, which, if sustained and allowed would not only have avoided the mortgage, but have defeated a recovery of any part of the debt. While that cause was thus pending, Mr. H. died, having made his will, in which his wife was appointed sole executrix, and as it is alledged, constituted her sole devisee of all his estate, real, personal and mixed, with a power to dispose of the same by public or private sale, for the purpose of paying his debts.

Mr. H. after he had filed his answer to the bill of Messrs. Cowperthwaite, Dunlap and Cope, repeatedly expressed the determination to pay his indebtedness to the United States Bank, by a transfer of so much of the property embraced by the mortgage as was sufficient for that purpose; and actually endeavored to originate a negotiation through which a settlement would be effected. But the death of the mortgagor, on the 11th August, 1839, closed all efforts to compromise the controversy. After that event, Mr. Cope, as agent of "The President Directors and Company of the Bank of the United States," came to Mobile, for the purpose of negotiating with the representatives of Mr. H. for the immediate possession of the mortgaged property, and thus putting an end to litigation. In furtherance of this object Mr. C. had many interviews with James Erwin, the brother of Mrs. Hitchcock, who represented himself to be fully authorized by her, and those who were interested in the estate of Mr. H. to treat with him, for the purpose of adjusting the controversy then pending—and it is accordingly charged, that Mr. E. was fully authorized by his sister, as devisee under the will of her husband, to exercise the power which he assumed.

A settlement was effected on the following terms, viz: The complainants were to advance one hundred and fifty thousand dollars in cash, which sum Mr. E. represented to be indispensable to pay the creditors of Mr. H., who were unprovided for;

Mansony and Hurtell v. The United States Bank and its Assignees.

this sum being paid, the complainants were, in virtue of a conveyance from Mrs. H. as the devisee under her husband's will, to enter upon and enjoy the mortgaged property without molestation of the representatives of Mr. H.; the bill filed against the mortgagor was to be abated by the failure to revive it; and the executrix named in the will was to decline taking upon herself its execution, and in her stead a friendly administrator was to be appointed, with the concurrence of the parties to the settlement, who should acquiesce therein.

In pursuance of the adjustment, the complainants paid to Mr. E. one hundred and fifty thousand dollars, to be applied to the debts of the creditors of Mr. H., whose debts were unsecured; the devisee, by deed of release, did convey to the complainants all her legal and equitable estate in the mortgaged premises, and they in turn executed to her a release of all demands against the estate of her deceased husband, saving such as were reserved by the mortgage executed by him. In addition to all which, the devisee made to the complainants an assignment of all the leases which were outstanding on the premises, and they consequently supposed that their possession was undisputed.

Further—Sometime previous to the negotiation with Mr. E. he purchased at a sale under execution, the reversionary interest of Mr. H. in eight store houses which had been conveyed by the mortgage, executed by the latter to secure his indebtedness to the Bank of the United States, for which he paid fifty dollars and received a sheriff's deed. Mr. E. represented to the complainants, that he purchased the houses for the purpose of strengthening his position in the negotiation. The eight houses were valued by Mr. H. in his mortgage at two hundred thousand dollars, and Mr. E. proposed to convey to the complainants whatever title he had acquired by his purchase, which was believed by the complainants to be a mere equity of redemption; but he requested the complainants to insert in the deed as its consideration, the sum of one hundred and fifty thousand dollars, stating that he would be thus left more at liberty in using that sum, which he was to receive, for the payment of the unsecured creditors of Mr. H. The wishes of Mr. E. were acceded to, but without any intention on the part of any one, of varying the terms of the settlement.

Isaac H. Erwin, a brother of Mrs. H., was appointed administrator of Mr. H. with the concurrence of the complainants, Mrs. H. and Mr. J. E. with a view to carry out the terms of the agreement they had entered into. But instead of thus acting, the administrator by every means in his power has molested the complainants, advertising that they were not in possession of the premises, and cautioning all persons not to pay them rent; he has leased much of the property and received a large portion of the rent, in violation of the settlement and to the destruction of complainants' security.

The bill sets out that the administrator pretends to have some claim to the premises, has asserted a property therein, &c., and prays that the claim may be inquired into, the debt due the Bank paid, or else that their title may be quieted and possession undisturbed, &c. Further, that the administrator be enjoined from all interference with the property, the rents, profits, &c.

Isaac H. E. Mrs. H. and her four infant children are the only defendants, the former of whom has answered. In his answer he denies that he was a party, or in any manner concerned in the negotiation, which was consummated by a settlement between the United States Bank, through its agent and Mr. J. E. He has refused to give effect to that settlement as administrator *cum testamento annexo*, for the reason that he conceives his powers will not authorize him to do so; besides his sureties and the creditors of the testator who are unprovided for, to a very large amount, object to his taking any steps which may impose liability upon the former, or jeopard the rights of the latter. In fine, he declares the honesty of his course, and a fixed purpose to adhere strictly to his duty, as it is defined by law.

At the term of the Chancery Court, holden in May, 1841, a motion was made for an injunction in this cause, to restrain the administrator *cum test. an.* from intermeddling in any way with the mortgaged premises described in the bill, or the rents and profits thereof; also "to appoint a receiver to be let into the possession, and have the management of, the mortgaged premises, and to collect and receive the rents and profits." These motions were granted in the terms in which they were asked, the Court ordering that the receiver collect and receive

Mansony and Hurtell v. The United States Bank and its Assignees.

as well the rents in arrear, which have accrued since the 8th February, 1840, as the rents to become due from the tenants. Further, that the receiver manage as well as let the estate, with the approbation of the Master, and pass his accounts and pay in his balances from time to time, and invest the same as the Court may direct. The administrator was ordered to deliver up to the Master all notes, &c. in his possession. If the parties could not agree in the appointment of a receiver, the Master was directed to appoint, and in either event take a bond with sureties in double the amount of the annual income of the estate, conditioned, &c.

The parties not being able to agree, the Master appointed a receiver, who executed a bond as required; all which were regularly approved.

It appears from the record, that the plaintiffs in error were tenants in possession of a valuable portion of the property mortgaged, under a lease, or a contract for a lease, made by Mr. H. on the 10th October, 1838; that the Court of Chancery at the term holden in November, 1841, ordered that the tenants of the mortgaged estate do immediately attorn to the receiver, and pay to him the rents in arrear since the time appointed by the decretal order of the preceding term, and the rents which may become due in future. *Further*, that the receiver have full power to institute proceedings in his own name for the recovery of the rents, &c. A copy of this order was served on the plaintiffs in error, and notice given them to show cause why an attachment should not issue against them for disobedience to its requirement.

Mansony and Hurtell appeared and showed cause against the motion, on oath. They admitted, that under the impression that Mrs. H., as executrix of her husband's will, was authorized to receive the rents, they executed a mortgage to her on property, to secure the payment of the rent on their lease; afterwards, on the 10th February, 1840, they admitted in writing that they were the tenants of Messrs. Cowperthwaite, Dunlap and Cope, and undertook to pay them the rent as it might fall due, when, by an application of the rents or otherwise, a debt for which they were pledged should be paid.

Afterwards, about the 30th October, 1840, Isaac H. Erwin, was appointed administrator *cum testamento annexo*, in con-

sequence of the refusal of Mrs. H. to execute bond, &c., and gave notice to the plaintiffs in error, to pay the rent to no one but himself; thereupon they gave notice to Messrs. Cowperthwaite and others of what had occurred, and asked to be indemnified against the demand of the administrator, but this was refused; and they refused to pay Messrs. C. &c. the rent.

After this had occurred, Jas. Erwin demanded of them the possession of the property which the plaintiffs in error held, claiming under a purchase made at a sale by the sheriff of Mobile, under an execution issued on a judgment of the Circuit Court of that county. which had been affirmed by the Supreme Court of the State, in which Wm. McGehee, use, &c., was plaintiff, and Henry Hitchcock defendant. The original and affirmed judgments were rendered before the lease was made to Messrs. Mansony &c.; the first, previous to the date of the mortgage to Messrs. Cowperthwaite, &c. The plaintiffs in error declined recognizing the title of J. E., and he brought an action for the recovery of the possession and damages in the Circuit Court of the United States, sitting at Mobile; which is still pending and undecided. Under the impression that they had acted unadvisedly in recognizing the right of Messrs. Cowperthwaite, &c. to receive the rents, and that the title of J. E. was the best, the plaintiffs in error did, in April, 1841, recognize him as their landlord, surrendered to him their lease, and accepted a new lease, reserving to him rent for a term yet unexpired; ever since which time they have held under J. E. and not otherwise.

Messrs. Mansony, &c. aver that neither Messrs. Cowperthwaite, &c. or the assignees of the Bank of the United States, have ever been in possession of the premises in question, and that the possession of the latter is entirely adverse to the pretensions of J. E. under whom they claim. *Further*, they allege that the stipulations of the contract between Mr. H. and the plaintiffs in error, were never performed by the former, though they retained the possession; but their losses in consequence of the failure of the testator or his representative has been adjusted and allowed them by I. H. E. as administrator, &c.

It is also stated that Messrs. Cowperthwaite, &c. or the assignees of the Bank, appeared in the Circuit Court of the Uni-

ted States, and asked to be permitted to defend as landlords of the plaintiffs in error, but after full argument the presiding Judge from interest or bias declined a decision of the question.

The allegations of the complainants in favor of the motion were fully sustained by affidavits or documentary proof.

In respect to the judgment in favor of McGehee, it appears to have been rendered both in the Circuit and Supreme Court, during the lifetime of Mr. H. After the judgment of affirmance, and in the year 1838, an execution was issued against the goods and chattels, &c. of the defendant therein, which was arrested by an injunction awarded at his instance. This injunction was continuing, and in full force at the time of Mr. H's death, and was not dissolved until the spring of 1840, when an execution again issued in July thereafter, and was satisfied by a sale of the property in question, by the sheriff according to law, to J. E.

In compliance with the motion of the complainants, the Court ordered an attachment to issue, unless Messrs. Mansony, &c. attorn to the receiver within two weeks. From this order Messrs. Mansony, &c. prayed an appeal, which was granted on condition that they execute a bond, &c.; but the condition was not complied with; and having sued a writ of error, they now seek a revision of the order.

STEWART & DARGAN for the plaintiffs in error. An appeal and a writ of error are equivalent remedies in chancery cases. [Aik. Dig. 237, §4, 255, §10.] Here the decretal order is final, and unless it can be revised, great injustice must be done either to the plaintiffs, or their landlord, Mr. Erwin. [1 Paige's Rep. 511; 6 Eng. Cond. Ch. Rep. 365; 2 Wend. Rep. 225-239; 9 Johns. Rep. 443; Harper's Eq. Rep. 67; 4 Paige's Rep. 378; id. 450; 16 Wend. Rep. 405; 2 J. J. Marsh. Rep. 72.] A person not a party to the original cause, whose rights are affected, may appeal. [2 Smith's Ch. Pr. 40.]

A tenant may show that his landlord's title has expired or determined since the lease was made. [3 Ohio Rep. 57; 2 Wend. Rep. 507; 6 id. 666; 22 id. 121; 3 M. & S. Rep. 516; 6 Law. Lib. 521.]

An attornment may be controverted if obtained without

right. [13 Johns. Rep. 537; 7 Wend. Rep. 401; 1 Rawle's Rep. 408; 6 Binney Rep. 47; 14 Serg. & R. Rep. 385.]

Where a tenant has not obtained possession directly from the plaintiff, but from another, although he may have admitted the plaintiff's title, yet he may disclaim and show title in himself or another. [2 Johns. Cases, 353; 7 Wend. Rep. 401; 12 id. 105; 1 B. & P. Rep. 326; 6 Taunt. Rep. 202; 1 Bing. Rep. 38-360; 3 id. 474.] And though he has received possession from the landlord, he may show that the landlord's title has been extinguished, or is determined. [Cro. Eliz. 398; 6 Law Lib. 521; 2 Starkie's Ev. 230; 20 Johns. Rep. 60; 22 Wend. Rep. 670; 22 id. 121.]

A disclaimer by the tenant, determines the relation of landlord and tenant, and the landlord may at once bring ejectment without waiting for the expiration of the term and without giving notice to quit. [Runn. on Eject. 92; 2 Johns. Rep. 272; 6 id. 337; 5 Cow. Rep. 123; 6 id. 617; 3 Wend. Rep. 337.]

The relation of landlord and tenant, will not continue between the assignees of the mortgagees and the tenant of the mortgagor. [6 Wend. Rep. 666.]

The defendant in an execution and those claiming under him, cannot controvert a deed made by the sheriff for property sold under its authority. [3 Caine's Rep. 188, 10 Johns. Rep.]

The sheriff's deed relates back to the judgment, and avoids all intermediate acts of the defendant in execution and those claiming under him. [22 Wend. Rep. 121; 2 id. 507; 3 Cow. Rep. 75; 15 Johns. Rep. 309.]

The sale under McGehee's execution, after the death of Mr. Hitchcock, was good, and the title passed to the purchaser. [4 Watts' Rep. 367; 5 How. Rep. 253; 13 Peters' Rep. 15-16; 13 Johns. Rep. *per* Chancellor, 549. See also Collingsworth v. Horne, 4 Stewt. & P. Rep.; and Preston v. Surgoin, Peck's Rep.]

An injunction does not destroy, it merely suspends the lien of the judgment. [1 Martin & Yerg. Rep. 373; 4 How. Rep. 178; 10 Leigh's Rep. 394; 3 Ala. Rep. 109.]

The receiver's remedy to obtain possession, except as to defendants and tenants who admit their tenancy, is by action. [Smith's Ch. Pr.; Jeremy's Eq. Juris.]

After a receiver has obtained the possession, the Court will

protect it; and those wishing to bring a suit to recover the possession, must apply to the Court for leave. [Smith's Ch. Pr.]

The Court respects the rights of third persons, and will dispossess no one unnecessarily; nor will this be permitted by means of a receiver. In the present case, the tenants have violated no duty in attorning to Erwin; and as Erwin is not made a party, the Court cannot determine to whom the rent should be paid; nor could a receiver be appointed with powers so as to affect them, as they have had no opportunity to answer. [7 Paige's Rep.; 1 Coxe's Ch. Rep. 422; 2 id. 383; 1 Paige's Rep. 17; 2 id. 450; 1 Ball & B. Rep. 75; 2 Russell's Rep. 149.]

The devise to Mrs. Hitchcock did not confer on her, by force of the will, an absolute estate in the realty of the testator; it was connected with the execution of the will; and as she declined assuming the office of executrix, nothing vested in her; and consequently nothing passed by her deed to Messrs. Cowperthwaite, &c. [21 Wend. Rep. 430; 25 id. 224; 7 Dana. Rep. 7; 1 Ohio Rep. 104; 4 Mass. Rep. 634; 4 Johns. Ch. Rep.; 2 Porter's Rep. 23; 3 id. 221; 5 id. 101-2-145; 8 id. 380; Minor's Rep. 206; 3 Stewt. Rep. 489; Aik. Dig. 183-450; 5 Louisiana Rep. 429.]

An order appointing a receiver, does not create a *lis pendens* as to any particular property. [1 Wend. Rep. 618.]

CAMPBELL & GIBBONS, for the defendants. The order of the Chancellor, which is complained of, is not final: it settles no rights; but is intended merely for the security of the property and fund in controversy, and relates to a matter resting in the discretion of the Court; it cannot, therefore, be revised on error. [8 Wend. Rep. 219; 16 id. 369; 9 Peter's Rep. 1]

There can be no doubt of the propriety of the order, if Messrs. Mansony, &c. were the tenants of the agents of the Bank, and that they occupied that relation is believed to be undoubted. [1 Smith's Ch. Prac. 636; 11 Eng. Cond. Ch. Rep. 248; 1 Hoffm. Pr. 443; 2 Paige's Rep. 103.]

The attornment to James Erwin is a fraud upon those who claim under Mrs. Hitchcock by contract, and would, if tolerated, permit the mere volition of the tenants materially to affect

Mansony and Hurtell v. The United States Bank and its Assignees.

the rights of such persons. [5 Peters. Rep. 402; 29 English Com. Law Rep. 16; 4 M. & S. Rep. 347; 6 Wend. Rep. 232; 2 Binn. Rep. 468; 4 Sergt. & R. Rep. 467; 3 Dev. & Battle Rep. 40; 4 id. 300; 5 Watts' Rep. 386; 5 Dana's Rep. 60; 6 Wend. Rep. 666; 22 id. 121.]

James Erwin purchased under an execution issued more than eight months after Mr. Hitchcock's death, on a judgment which was enjoined upon Mr. H's application, and which continued suspended in its operation, until a short time before the execution issued. By the death of the defendant, his property vested in other persons as his representatives, and in order to subject it to seizure and sale, they should be notified by legal process, that they may show cause against the issuance of an execution. [2 Saunders' Rep. 78; 2 Paige's Rep. 365; 10 Wend. Rep. 207; 4 Stewt. & P. Rep. 238; 6 Porter's Rep.]

In England an execution bears test from its issuance, and though the defendant dies between the time of the test and actual issuance, his executor will not be allowed to show the fact so as to defeat the execution. [Bragner v. Longmead, 7 T. Rep. 20] The case cited from 5 Watts' Rep. merely shows that this principle of the common law was acknowledged in Pennsylvania, where an execution against lands was tested in defendant's lifetime. This rule, as applied in that State, is well explained in Peters' C. C. Rep. 269. But in this and the most of the States of the Union, the fiction which supposes an execution to become operative from its test, has been abolished. [Fryer v. Dennis, 3 Ala. Rep.; 1 Cow. Rep. 711; 10 Wend. Rep. 206; 9 id. 452; Taylor's Rep. 262; 1 Dev. & B. Rep. 561-356; 1 Yerger. Rep. 41; 10 id. 329; 2 Ohio Rep. 211-287; 2 Bibb. Rep. 19; 4 J. J. Marsh. Rep. 280; 3 G. & Johns. Rep. 359; 6 id. 321; 16 Mass. Rep. 191.]

A judgment only operates as a lien upon lands so long as it may be enforced by execution, and if its vitality be suspended, the lien is lost, to commence anew, only from the time when life shall be again restored to it [1 Ala. Rep. 373; 4 Stewt. & Porter's, 269-280; 3 Porter's Rep. 138-145-153; 3 Munf. Rep. 417; 2 Brockb. Rep. 252; 4 Peter's Rep. 124; 13 Peter. Rep.] The effect of an injunction is to inhibit the issuance of an execution; the plaintiff acquires a new security in the bond, for the satisfaction of his judgment; and on this, if successful

in dissolving the injunction he is entitled to execution. Although McGehee's judgment at one time was a lien upon the real property of Mr. H. of which he was the *legal owner*, yet the injunction, by suspending its operation, destroyed that lien; and before its dissolution Mrs. H. becoming a trustee under the will of her husband, with powers beyond and independent of the office of executor, conveyed the entire mortgaged property to Messrs. Cowperthwaite, &c.; and thus prevented the lien from reattaching.

It has been decided in the cases last cited from our own reports, that an injunction regularly issued, upon the execution of a bond with surety, releases the defendant's property from any lien which may have attached in virtue of the execution; and if the lien of the judgment is dependent upon the right to enforce its collection, the same consequence must follow in respect to the judgment. These decisions have settled a rule of property in which the profession have acquiesced, and which cannot be now departed from, without unsettling valuable interests. It is needless to add argument to this point, or it could be shown that the injunction in this State operates not less against the judgment than the party against whom it is sued out. The case in 8 Yerger, 452, it is believed, is adapted to statutes and a practice materially different from our own.

COLLIER, C. J.—We do not consider it necessary to a decision of this cause to examine all the interesting questions discussed at the bar; and shall content ourselves with inquiring, 1. Did not the mortgage by Mr. Hitchcock and wife, executed in 1838, and the failure of the former to pay the debt, (intended to be secured,) as stipulated, entitle the mortgagees to recover of the plaintiffs in error, as his tenants, the rent becoming due after the forfeiture of the mortgage? 2. Was the execution issued on the judgment in favor of McGehee, use, &c., so far void, that a levy on and sale of property thereunder, would not invest the purchaser with a title? 3. Is the order of the Chancellor directing an attachment to issue against Messrs. Mansony and Hurtell, such a sentence or decree as may be revised on error?

1. Where a mortgage is drawn in usual form, without any stipulation, expressed or implied, as to the possession, or the

rents accruing previous to the forfeiture, the legal estate vests immediately in the mortgagee, who may maintain an ejectment against the mortgagor. But if it is provided by the mortgage, that the mortgagor shall retain the possession until default is made in the payment of the debt, or interest, then the mortgagee cannot sue at law until after forfeiture is incurred. [See *Doe ex dem Duval's heirs v. McLoskey*, 1 Ala. Rep. N. S. 729, and cases there cited; also, 1 Lomax Dig. 327.] In the case cited, the Court say, "The creditor who takes a mortgage to secure a debt by bond or otherwise, has three remedies, either of which he is at liberty to pursue, and all of which it is said, he may pursue, until his debt is satisfied. He may bring an action at law on the bond; or he may put himself in possession of the rents and profits of the land mortgaged by means of an ejectment or trespass to try titles; or he may foreclose the equity of redemption, and sell the land to satisfy the debt." Again; "the general current of authority maintains the right of the mortgagee to enter at any time upon the land mortgaged, or bring an action for the recovery of the possession, unless it appears by express stipulation, or necessary implication, that the parties understood that the mortgagor should remain in possession." In the present case it is entirely immaterial what were the stipulations of the mortgage, in respect to the possession of the mortgaged premises previous to the mortgagor's default; for it is shown by the record, that the mortgagor failed to pay the first instalment of the debt, and that a bill for a foreclosure was filed previous to his death. The inference from these facts is, that the legal title had vested in the mortgagee, and it was competent for him to have sued at law for the recovery of the possession. [*Keech v. Hall*, Doug. Rep. 21.]

The statute of 4 Anne Ch. 16, having dispensed with the attornment of tenants to the grantees of rents and reversions, it has been held in England that the mortgagee of land, which at the time of mortgage, was under a demise to a tenant, may in case of non-payment of the interest, give notice of the mortgage to the tenant in possession, and recover the rent in arrear at the time of the notice, as well as what afterwards accrues. [1 Lomax's Dig. 330; see also *Chambers et al v. Mauldin et al*, at the last term, and cases there cited. *Moss v. Gallimore*,

Doug Rep. 266, is a leading case to this point. There it appears that one Harrison being seized in fee of certain premises, on the 1st of January 1772, demised them to the plaintiff for twenty years, at a rent of £40, payable yearly on the 12th of May; and in May of that year, he mortgaged the same premises to the defendant, Mrs. Gallimore in fee. The plaintiff continued in possession, and paid the rent regularly to the mortgagor, with the exception of £28, which was due on or before November, 1778, when the latter became a bankrupt, being then indebted to the mortgagee more than that sum, for interest on the mortgage. On the third of January, 1779, the agent of the mortgagee showed the plaintiff the mortgage, and demanded the rent then remaining unpaid. To this demand the plaintiff replied that the assignees of the mortgagor had demanded the rent on the 31st December preceding; but the agent saying that the mortgagee would distrain if the rent was not paid, the tenant said he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff not having paid according to his contract, the other defendant, by order of Mrs. Gallimore, entered and distrained for the rent, and gave a written notice of the distress to the plaintiff. The cattle and goods distrained were accordingly sold; and the question was, whether, under all the circumstances, the distress could be justified. It was insisted for the plaintiff that the defendant Gallimore, not being, at the time when the rent distrained for became due, in the actual seizin of the premises, nor in the receipt of the rents and profits, she had no right to distrain. *Lord Mansfield* said, "Of late years the Courts have gone so far as to permit the mortgagee to proceed by ejectment. if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not the mortgagor. This however is entangled with difficulties. The question here is, whether the mortgagee was or was not entitled to the rent in arrear. Before the statute of Queen *Anne*, attornment was necessary, on the principle of notice to the tenant; but when it took place it certainly had relation back to the grant, and like other relative acts they were to be taken together. Since the statute the conveyance is complete without attornment, but there is a provision that the tenant shall not be prejudiced for any act done

by him, as holding under the grantor, till he has had notice of the deed. Therefore the payment of rent before such notice is good. With this protection he is to be considered by force of the statute, as having attorned at the time of the execution of the grant; and here the tenant has suffered no injury. No rent has been demanded which was paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title." Again: "The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases. He has the legal title to the rent, and the tenant in the present case cannot be damnified, for the mortgagor can never oblige him to pay over again, the rent which has been levied by this distress. I therefore think the distress well justified; and I consider this remedy as a proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor." The opinions of the entire bench were in harmony with these views. [See also, *Doe ex dem Marriott v. Edwards*, 5 B. and Adol. Rep. 1065; *Pope v. Biggs*, 9 B. and C. Rep. 245; *Waddilove v. Barnett*, 4 Dowl. P. Rep. 348; *Vallance v. Savage*, 7 Bingh. Rep. 595; in which it is considered as perfectly clear and settled, that a mortgage operates as a transfer in law of all leases of the mortgaged premises, which the mortgagor has made; and that the mortgagee, upon giving notice to the tenants may recover rent. In fact these cases maintain, that where a mortgagor continuing in possession, demises the premises for a term of years, the mortgagee may treat the mortgagor as his agent in making the lease, and demand of the lessee the rent unpaid, upon giving him notice of the mortgage.

The law in this State is precisely the same as it is in England, so far as it respects the right of the mortgagee to recover rent of the tenants of the mortgagor. We have a statute which modifies the common law to the same extent as does that of 4 Anne. It is in these words: "Every grant or conveyance of messuages, lands, tenements, and hereditaments, shall be good and effectual without attornment of the tenant; but no tenant who before notice of such grant or conveyance, shall have paid the rent to the grantor, shall be prejudiced, or suffer any damage by such payment." [Aik. Dig. 93]

Mansony and Hurtell v. The United States Bank and its Assignees.

In the present case, however, it appears that the plaintiffs in error admitted in writing that they were the tenants of the mortgagees, (Messrs. Cowperthwaite, &c.) and undertook to pay them rent, when by an application of the rents, or otherwise, a debt for which they were pledged was satisfied. It is true that they subsequently acknowledged the title of James Erwin, surrendered to him their lease and accepted from him another, by which they agreed to pay him rent. There is nothing in the record to show that in all this the plaintiffs in error have not acted with entire good faith; merely acknowledging the title of the one party or the other as they thought it best, without any advantage to themselves. And even if the complainants have acquired no title in virtue of the deeds executed by Mrs. Hitchcock and James Erwin, yet the mortgage it must be conceded is *prima facie* valid; and from the showing made, authorized the appointment of a receiver of the rents of the property in question, until it should be ascertained by the Court, who had the paramount right to them. This was a step important to the complainants if it should appear that their title is superior to the defendants'; otherwise, after having obtained the decree they seek, they might be compelled, in order to recover the rent, to prosecute another suit against James E.

The appointment of a receiver being regular, it was clearly competent for the Court, to direct the tenants to pay the rent to him, and if they refused to attorn, to follow up that order by the issuance of such compulsory process as was necessary to make it effectual. The order for an attachment against the plaintiffs in error would have effected nothing more; and was consequently proper.

2. A judgment in this State is a lien upon the lands of the debtor within the same, in virtue of the statute which authorizes their extension under the writ of *elegit*. [Morris v. Ellis, 3 Ala. Rep. 560; Campbell, use, &c. v. Spence et al, at this term; see also Winston & Fenwick v. Rives, 4 Stew. and P. Rep. 280; Pope v. Brandon et al, 2 Stew. Rep. 401; Ridgely's Ex'rs v. Gartrel, 3 H. and McH. Rep. 449; Calhoun v. Snyder, 6 Binn. Rep. 135; Stow v. Tift, 15 Johns. Rep. 464; Roads v. Symm et al, 1 Ohio Rep. 281; Bank U. S. v. Tyler, 4 Pet. Rep. 366; United States v. Morrison, id. 124; Rankin v. Scott, 12 Wheat. Rep. 177; Woodcock v. Bennet, 1 Cow.

Rep. 711; Bank U. S. v. Winston's Ex'rs. et al, 2 Brockb. Rep. 252; Stymets v. Brooks, 10 Wend. Rep. 211-12] But the plaintiff, in order to make his lien available is not obliged to extend the lands of the defendant; if he chooses he may have them levied on and sold under a *fiieri facias*. [Morris v. Ellis *ut supra*]

Assuming in the present case, that Mr. Hitchcock's title to the property in question, was such as the judgment recovered by McGehee could reach, the question is, has its lien been defeated or delayed by any subsequent act or occurrence? It has been repeatedly decided by this Court, that where a defendant sues out a writ of error, and supersedes the execution by entering into bond with surety, or obtains an injunction, the lien of the execution is entirely destroyed. [Barnes v. Baker & Sledge, Minor's Rep. 373; McRae and Augustin v. McLean, use, &c. 3 Porter's Rep. 145, 153; Wiswall v. Monroe, at the last term; Campbell, use, &c. v. Spence et al, at this term.] And in Winston and Fenwick v. Rives, [4 Stew. and P. 280,] the Court say they think it clear, that the lien of a *fi fa.* on personal property, or of a judgment on lands, is discharged by a bond for a writ of error, or by an injunction.

In the Bank of the United States v. Winston's Ex'rs. et al. [2 Brockb. Rep. 252,] Chief Justice Marshall says, "As the lien created by a judgment is given by the statute which authorizes an *elegit*, it is settled in this country that the lien depends upon the right to sue out an *elegit*." [See also 2 Call's Rep. 125; 4 H. & Munf. Rep. 57.] Again: continues the learned Judge, "In the case of Scriba v. Deanes, ante. vol. 1, page 170, this Court determined that the lien of a judgment on which execution is stayed, dates not from the time of its rendition, but from the time when execution may be sued out. I have not changed this opinion." To the same effect are the cases of Jackson v. Bartlett, 13 Johns. Rep. 533; Conrad v. The Atlantic Insurance Company, 1 Peter's Rep. 443; United States v. Morrison, 4 Peter's Rep. 124; Burton v. Smith et al. 13 Peter's Rep.— And this Court in Campbell use &c. v. Spence et al. *ut supra*, determine that a *bona fide* purchaser, under a *fiieri facias* upon a junior judgment, would be protected. In the language of the Court, in the case of Den v. Hill, [1 Haywood, 72,] "were the law not so, it would be the most dangerous thing in the world

to purchase land at an execution sale. Dormant judgments might be revived a long time afterwards, and the innocent vendee evicted without the possibility of ever regaining the purchase money." In such case, the lien of the elder judgment would be lost by the laches of the plaintiff."

By the common law, all proceedings in a suit at law are stopped by the death of one of the parties. If either die before judgment, no judgment can be entered: if after judgment, no execution can issue. To avoid the inconvenience resulting from this principle, the judgment is made to relate back to a day previous to its rendition, or the execution to bear teste of the term when the judgment is supposed to have been rendered. [Hildreth v. Thompson, 16 Mass. Rep. 192; Stymets v. Brooks, 10 Wend. Rep. 211-12.] In the latter case, it is said, "After the death of a defendant, no execution can issue against his personal representatives, heirs, or terre-tenants, without a *scire facias*. [2 Saund. Rep. 6, n. 1, 72, a. Bacon tit Execution 731, pl. 14 note; 2 Tidd, 1029; 2 Arch. prac. 88.] The reasons given are, that a new party is affected by the execution, and there would be a discrepancy between it and the record, and indeed there is no authority for the process. A *scire facias*, therefore, is necessary not only to make these new parties parties to the record, but to give them a day in Court to shew cause, if any, against the application of the property to the discharge of the judgment." It is further maintained by the Court, that the English doctrine of the relation of an execution to the day of its teste, so as to operate a lien upon the goods of the defendant from that time, is applicable alone to the writ of *fieri facias* which issued against the goods and chattels of the defendant. [See also 2 Saund. Rep. 6, n. 1; 2 Lord Raym. Rep. 849; 1 Archb. Prac. 282; 2 id. 88; 2 Tidd. Prac. 915; 1 Saund. Rep. 219, e. f.]

In respect to the relation of a judgment to the first day of the term, when it was rendered, this Court decided that it was a mere legal fiction, which would never be allowed to defeat the purposes of justice; and that a judgment became a lien upon the defendants lands from the time of its rendition, and not sooner. [Pope v. Brandon et al., 2 Stewt. Rep. 408.]

It has been expressly adjudged, that an execution which directs money to be made of the lands and tenements of a defen-

Mansony and Hurtell v. The United States Bank and its Assignees.

dant who is dead, is irregular and void [Woodcock v. Bennet, 1 Cow. Rep. 740; Stymets v. Brooks, 10 Wend. Rep. 212; Morton v. terre-tenants of Croghan, 20 Johns. Rep. 106.] The mandate of such a writ cannot be executed; for the reason, that by the death of the defendant previous to its issuance, all the real estate of which he was possessed ceased to be his, and *eo instanti* vested in his heirs, who cannot be divested of it without an opportunity of being heard. Being void, the execution is regarded (it is said) as a nullity from the beginning, so that a purchaser under it acquires no title as against heirs or devisees. [1 Cow. Rep. 734-5-6.] And its invalidity may be shown to the Court by extrinsic proof.

In Collingsworth v. Horn, [4 Stewt. & P. Rep. 237,] it was considered, that the issuance of an original *feri facias* against the property of a defendant, after his death, might be irregular, but where an original issued in his lifetime, an *alias* or *pluries* issued thereafter would not be void, and might be sustained as a continuation of the first execution, and to keep alive the lien which it created upon the personalty. [See also Doe ex dem. Price v. Lucas at this term.] But it has been held that there is a distinction between the real and personal estate in this respect. That it is the judgment, not the execution, which gives the lien upon the former; and while the execution is permitted to continue as to the personalty, the judgment does not survive as to the realty. [1 Cow. Rep. 740-1.]

We have very cautiously stated the law on this point, as we find it laid down in the book. Our conclusion upon the first question considered, relieves us from the necessity of making any definitive decision of the second, although it has been elaborately discussed at the bar. Our impression is very strong, that the lien of McGehee's judgment was suspended by the injunction obtained by Mr. Hitchcock and continued after his death; and the execution subsequently issued was irregular, and did not authorize the levy on, and sale of the lands of which he died possessed. In fact, the first branch of this proposition may be regarded as settled by our own decisions; the latter, as it may perhaps be desirable, we are willing to leave open to be again examined when it shall arise.

3. The order for an attachment against the plaintiffs in error, is not a final decree in the cause, but is intended to provide for

the security of the rents of a portion of the property in controversy, until it shall be determined whether the complainants are entitled to them. In this view of the question, and which seems to us to be strictly correct, we think it clear, that a writ of error will not lie upon the order of the Chancellor either at common law or under our statutes. In *Creighton et al. v. The Planters and Merchants Bank*, [3 Ala. Rep. 156,] it is true, the Court say, "By our statute, appeals and writs of error appear to be considered as equivalent remedies, and we think we shall most effectually carry out their intention by allowing the writ in this instance." In that case the order was final, and the question was, whether it should not be revised by appeal, instead of a writ of error. The generality of the remark must be restricted to the case before the Court, and thus considered is correct; for the statute gives either an appeal or writ of error upon such a definitive sentence, [Kennedy's heirs and ex'rs. v. Kennedy's heirs, 3 Ala. Rep. 434.] would seem to lead to the conclusion, that an interlocutory order, which is the subject of revision, should be removed to the higher Court by appeal. Without undertaking to inquire whether the order in the present case, is of that character, we are satisfied that the writ of error cannot be sustained, and accordingly direct that it be dismissed.

PLANTERS AND MERCHANTS BANK OF MOBILE v. LEAVENS.

1. Stock owned by an individual in an Incorporated company, cannot be subjected to the payment of his debts by garnishing the corporation.
2. A corporation can answer process of garnishment only under its common seal.

Error to the Circuit Court of Mobile.

In this case, which was commenced by original attachment, by the defendant in error, against the firm of Green & Co., the

The Planters and Merchants Bank of Mobile v. Leavens.

plaintiff in error was summoned as garnishee, the direction being to summon the President and Cashier of the Bank.

The President and Cashier answered on oath, stating in substance that Sidney Green, one of the defendants, was the owner of five shares in the capital stock of the Bank, and that a dividend of fifteen dollars had been declared thereon and stood to his credit on the books of the Bank.

Upon these answers the Court rendered judgment against the Bank as garnishee, for three hundred and forty dollars ninety-three cents, the amount of the claim of the plaintiff in attachment against Green & Co., "to be discharged upon the delivery or transfer of the said five shares of stock, and the said sum of fifteen dollars in cash to the plaintiff."

From this judgment the Bank prosecutes this writ, and assigns for error: 1. That the answers of Heard and Riggs, the President and Cashier, were made in their individual capacities.

2. That the Bank could only answer under its common seal.

3. That the stock held by the defendants was not subject to the process of attachment, or that, if so subject, it should have been condemned to be sold.

4. Because, by the judgment that the plaintiff be discharged upon the delivery or transfer of the stock, when a delivery is impossible, and it has no authority to make a transfer.

GIBBONS for plaintiff in error cited, 1 Ala. Rep. 398; 2 id. 73; 9 Johns. 99; Tidd's Practice, 934; 3 Murphy, 65; Aik. Dig. 37.

CAMPBELL, contra.

ORMOND, J.—Without deciding whether a corporation aggregate is subject to the process of garnishment, it is clear that the Bank has never appeared and answered in this case. Such answer could only be made under its common seal, by authority of its executive officer. The individual answers of the President and Cashier, under oath, cannot bind the Corporation. See the Branch Bank of Mobile v. Poe, 1 Ala. Rep. 396.

But, independent of this objection, stock held by an individual in an incorporated company, being a mere chose in action,

Caldwell v. Meador.

cannot be subjected to the payment of his debts, by process of garnishment. The impropriety, as well as injustice of such an attempt, is manifest in this case. A judgment is rendered against the Bank, estimating the stock at one hundred dollars the share, its nominal value, when, for aught the Court can know, it may not be really worth ten dollars the share. These consequences are attempted to be obviated in the judgment rendered, by giving to the Bank the power of discharging itself from the payment of the judgment rendered against it for the debt, by the delivery or transfer of the stock.

It is perfectly clear that the Court had no power to render such alternative judgment, nor had the Bank the power to do the alternative act. It could not vest the title in the stock by delivery, if in its possession; nor had it the right to make a transfer. In every aspect of this case it is erroneous, and the judgment is therefore reversed and the cause remanded.

CALDWELL v. MEADOR.

1. A Justice of the Peace has no authority under the attachment laws of this State, to issue an attachment returnable into the County or Circuit Court of any other County, than that for which he is appointed.

WRIT of Error to the County Court of Sumter County.

Caldwell sued out an attachment before a Justice of the Peace of Greene County, and the writ was made returnable to the County Court of Sumter County. On its return, the attachment was quashed by the County Court, on the ground that the Justice issuing it had no jurisdiction.

This is now assigned as error.

SMITH, for the plaintiff in error, argued that the authority is general in its terms, and being so there is no more reason to re-

Caldwell v. Mendor.

strict a Justice of the Peace to his county, than there is to restrict a Judge of the County or Circuit Court. [Dig. 37, §2.]

MANNING, contra.

GOLDTHWAITE, J.—It is true, the statute in very general terms authorizes any Judge of the Circuit or County Courts, or any Justice of the Peace, to issue writs of attachment; [Digest, 37, §2,] but we think these powers are conferred with reference to the extent of the general duties of these officers, and that it was not intended to enlarge the circle of their jurisdiction. Ordinarily, the duties of a Justice of the Peace are to be exercised by him within his proper county, and where general terms are used with reference to new duties imposed on this grade of officers, they must be considered as confined to the county, unless a more extensive jurisdiction is expressly given.

We think the Justice had no jurisdiction to issue this attachment, and therefore the judgment is affirmed.

INDEX.

ABATEMENT.

1. When partners sue on a note payable to the firm, proof of the partnership as alleged cannot be required, unless it is denied by a plea in abatement. *Bell v. Crosby & Co.* 575.
2. A plea containing matter in abatement and concluding in bar, is bad as a plea in abatement and may be taken advantage of on demurrer. *Banks v. Lewis.* 599.
3. A plea in abatement to a suit commenced by attachment because of a defective affidavit, should set out the affidavit on *oyer*. *Ibid.*
See Pleading, 23, 24.

ACTION.

1. To recover upon a decree rendered in a sister State in favor of infant wards, who there sued by their guardian, an action should be prosecuted in this State in the name of the wards as legal plaintiffs, and not by the guardian, merely describing himself as such on the record. *Croft v. Topp.* 238.
2. When a suit is commenced in the name of a person without his consent, and carried on for the benefit of another who claims an interest, the plaintiff on the record is authorized to dismiss the suit unless indemnity is given him against the costs; but the erroneous action of an inferior Court in allowing such a plaintiff to dismiss his suit can only be corrected by *mandamus*. *Brazier v. Tarver.* 569.
3. Where a note is made by an association of individuals as a banking company and it is made payable to one of themselves, or bearer, if it is put in circulation without any indorsement, a *bona fide* holder may institute suit in the name of the payee, for his use, against any other member of the association. *Elliott, use, &c. v. Montgomery.* 600.
See Execution, Writ of, 3, 4.
See Bond, 2.

ACTION—QUI TAM.

1. No judgment can be rendered in an action brought to recover a penalty by a common informer, after the repeal of the statute giving the penalty, unless some special provision for that purpose be made by statute. *Pope v. Lewis.* 487.
2. The commencement of a suit for the penalty does not give a vested right to it, but will entitle the party so suing to a preference over one suing subsequently. *Ibid.*

ALIENS.

1. An alien may take land by the act of the parties, as by purchase or devise, and hold until office found; but he cannot take by act of law, as by descent, as he has no inheritable blood. An alien cannot, at common law, be heir to any one, nor can he transmit inheritable blood to another. *Smith et als v. Zaner et als.* 99.

AMENDMENT.

1. A writ issued against several, which was returned "executed," as to all; after a judgment by default was rendered, the sheriff *mero motu* amended his return, so as to make it appear that the writ was executed on one of the defendants, and returned *non est inventus* as to the others. *Held*, that the erasure of the sheriff's amendment by the Court to which the suit was brought, was, under the circumstances, allowable. *Watkins et al v. Gayle, use, &c.* 153.
2. A sheriff may amend his return to a writ of *fiery facias* issued at the suit of an indorsee against the maker of a promissory note, so as to make it conform to the statute, although several years have elapsed, an action been commenced against the indorser, and a declaration filed, alledging that the return was such as it is made by the amendment; and the amended return will have a retrospective relation, and be evidence for the plaintiff on the trial against the indorser. *Woodward v. Harbin.* 534.

APPEALS AND CERTIORARI.

1. The statute requiring the appellant from the judgment of a Justice of the Peace to give bond, applies as well to the plaintiff as to the defendant. *Quinn et al v. Adair.* 315.
2. An appeal bond given by the plaintiff, conditioned to sustain and prosecute the appeal, will not sustain a judgment against the securities to it, the words *to pay and satisfy the condemnation of the Court*, being required by the statute and omitted from the condition. *Ibid.*
3. It is competent for a Justice of the Peace to quash an execution issued by himself, and a party prejudiced by a refusal to quash, may remove the proceeding into a higher Court by *certiorari*. *Gilliland, use, &c. v. Ware et al.* 414.

ASSUMPSIT, ACTION OF.

1. Although the charter of a Rail Road Company authorizes a sale of the stock of a subscriber for the non-payment of calls made thereon, yet an action of *assumpsit* will lie upon his subscription, which is a promise to pay. *Carlisle v. The Cahawba and Marion Rail Road Company.* 70.
2. If an attorney acknowledge in writing that he has notes belonging to J. S., to be applied to the payment of the debts of a firm, of which J. S. was a member, he is liable to J. S. in an action for money had and received, for such part of the notes as may have been collected, and not appropriated to the payment of the creditors of the firm. *Mardis' Adm'rs. v. Shackleford.* 493.
3. Where a contract was entered into for the performance of professional services, the value of which was to be ascertained by arbitration, if the parties could not agree; if the party for whom they are rendered refuses to have them arbitrated, *assumpsit* will lie for a *quantum meruit*. *The Bank of the State of Alabama v. Martin & Huntington.* 615.
See Contract, 16.

ATTACHMENT.

1. A suit commenced by attachment is within the law forbidding process, &c. to be served on Sunday. *Cotton v. Huey & Co.* 56.
2. When an attachment is levied on Sunday its service cannot be abated by plea. The proper course is to move the Court to set aside the process for irregularity. *Ibid.*
3. A debt to fall due in future for services to be afterwards rendered may be transferred by assignment before the services are rendered, and such transfer, if *bona fide*, will defeat an attachment subsequently sued out against the transferor. *Payne v. The Mayor and Aldermen of Mobile.* 333.
4. An attachment cannot be sued out where the indebtedness of the defendant depends upon a contingency which may never happen: *aliter*, where the indebtedness is absolute, though the day of payment has not arrived. *Miller et al v. McMillan et al.* 527.
5. Where an attachment against a non-resident debtor was continued in Court for more than six months after its return, it cannot be objected to a judgment rendered thereon, that publication of its pendency was not made. *Ibid.*
6. The 8th section of the attachment act of 1837, does not warrant the suing out of an ancillary attachment in an action of detinue. This process is authorized in such action only as can be commenced by original attachment. *Le Baron v. James.* 687.
7. A Justice of the Peace has no authority under the attachment laws of this State, to issue an attachment returnable into the County or Circuit Court of any other county, than that for which he is appointed. *Caldwell v. Meador.* 755.
See Covenant, 1.
See Pleading, 11, 12.
See Bond, 2.
See Mandamus, 1.
See Garnishee, 8.

ATTORNEY AT LAW.

1. If an attorney acknowledge in writing that he has notes belonging to J. S., to be applied to the payment of the debts of a firm, of which J. S. was a member, he is liable to J. S. in an action for money had and received, for such part of the notes as may have been collected, and not appropriated to the payment of the creditors of the firm. *Mardis' Adm'rs. v. Shackleford.* 493.
2. Where an Attorney, by a formal receipt, or mere memoranda, acknowledges that notes and accounts *past due* are placed in his hands, the presumption is that he received them for collection; and the legal effect of such a writing is an undertaking that he will use due diligence for that purpose. *Ibid.*
3. An Attorney at Law, in whose hands notes, &c. are placed for collection, will be individually liable for neglect, or for money had and received, though he give notice that he had afterwards associated with him a partner in the practice of his profession, who collected the money, unless the client recognized the partnership in the transaction of his business. *Ibid.* 494.
4. An Attorney at Law is only liable for gross negligence, which is a question of fact; and the proof of it must always vary, according to the case stated in the declaration. *Ibid.*
5. The receipts of an Attorney for notes, &c. for collection, do not in themselves prove that he is guilty of negligence; but if the receipt is of an old date, and the

ATTORNEY AT LAW—CONTINUED.

- Attorney was informed of the debtor's residence, or upon due inquiry might have been, and did not discharge himself from his engagement to collect the debts, in the absence of countervailing proof, negligence may be inferred. *Ibid.*
6. The measure of damages to which an Attorney is liable for failing to perform his undertaking with his client, is the loss which has resulted from his negligence. *Ibid.*
 7. Where an Attorney gave his receipt for receipts which third persons had given for notes, &c., the inference will be that he undertook to supervise the collection of the notes, &c., to make settlements with the persons who held them; and if he neglected to perform that duty so that injury resulted, he will be chargeable. *Ibid.*
 8. An Attorney who collects money in his professional character, is not liable to an action until after demand; but where he has agreed, in advance, to pay over money when collected to the creditors of his client, and fails to do so, such undertaking dispenses with a formal demand. *Ibid.*
 9. The statute of limitations in favor of an Attorney who is charged with negligence in the performance of a professional engagement, begins to run from the time he became liable to an action, although the damage may not be developed, or become definite, until sometime afterwards. And an Attorney who undertakes to collect notes &c. by suit, must sue to the first Court, to which, with reasonable diligence, suit could be brought; if he fails, he is suable immediately. *Ibid.*
 10. An agreement by counsel to attend to the litigated business of a Bank, pending and to be brought before the Courts, to the end of the then current year, does not oblige the counsel to attend to such as are undetermined at the end of the year. *The Bank of the State of Alabama v. Martin and Huntington.* 615.
 11. The act of 1839, in prescribing the salary of the Attorneys of the State Bank and its branches, applies alone to the regular Attorney in the different Banks, who is elected by the Directors, and does not inhibit the Banks from the employment of such other professional assistance as their interest may require. *Ibid.*

ATTORNTMENT.

See Mortgage, 12.

BAILMENT.

1. When a slave is loaned by a father to his son, the mere possession of the slave, although it may have induced a credit to be given to the son, will not subject the slave to the payment of his debts. *Norris v. Bradford.* 203.
2. Whenever a contest arises between a creditor or purchaser of a bailee and one claiming to be the owner, the question of fraud is involved—and when property is loaned by a father to a son, for an indefinite period, and for no specific object, it is competent for a jury to infer either that a gift was intended, or that there was a fraudulent intention to deceive creditors. *Ibid.*

BANK.

1. Where a notice was given by a Bank that a motion would be made for judgment against four persons, and a judgment was taken against two only, and this judgment set aside and the cause continued, and at the next term a judgment was taken against all four, without any other notice, the judgment against all

BANK—CONTINUED.

- was erroneous, because there was no evidence that a motion was submitted at the first term against the two who were not noticed in the first judgment. *Crawford et al v. The Planters' and Merchants' Bank.* 313.
2. An agreement by counsel to attend to the litigated business of a Bank, pending and to be brought before the Courts, to the end of the then current year, does not oblige the counsel to attend to such as are undetermined at the end of the year. *The Bank of the State of Alabama v. Martin and Huntington.* 615.
 3. The act of 1839, in prescribing the salary of the Attorneys of the State Bank and its branches, applies alone to the regular Attorney in the different Banks, who is elected by the Directors, and does not inhibit the Banks from the employment of such other professional assistance as their interest may require. *Ibid.*

BASTARDY, AND PROCEEDINGS IN.

1. If the proceedings before the Justice of the Peace in a case of bastardy, are defective, the defendant should move the County Court to quash them before he appears, and impliedly admits himself to be regularly in Court. *Trawick v. Davis.* 328.
2. The bond given for the appearance of one charged with being the father of a bastard child should be made payable to the Governor. *Ibid.*
3. *Semble*—the bond entered into to answer to a charge of bastardy, is binding upon the obligors until the case is disposed of, though it may be continued for several terms. Be this as it may, the continuance of the case on the defendant's affidavit will keep it in Court as to him. *Ibid.*
4. The act of 1811, as modified by the act of 1816, only requires an issue and trial by jury to ascertain the paternity of a bastard child, where the reputed father demands it. *Ibid.*
5. The appearance of the reputed father is not indispensable to authorize the Court to determine the question of filiation. *Ibid.*
6. Under our statutes it need not appear of record, that it was shown to the County Court that the bastard child was still living. *Ibid.*
7. Notwithstanding the remedy provided by statute, a direction in the judgment against the father of a bastard child, that an execution issue thereon for each default in the payment of the sums adjudged to be paid, is regular. [COLLIER, C. J., *dissenting on this point.*] *Ibid.*
8. The mother of a bastard child should not be made a party to a writ of error prosecuted by the father, but the Judge of the County Court, who is considered as the legal plaintiff in the judgment, should be made the defendant. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. When the holder of negotiable paper to which there exists an equitable defence has given no consideration for its transfer, but it is held merely as a collateral security, to secure a debt due from the payee of the paper, it is open to the same defence as if it was held and owned by the payee. *Quere*, as to how the case would be if the note was not held merely as collateral security, and a new consideration was given, either by the discharge of other paper or of other parties. *Cullum v. The Branch of the Bank of the State of Alabama at Mobile.* 22.
2. Where the maker of a promissory note, not negotiable in its terms, transfers an account upon another person to the payee, who agrees to take it as a payment subject to the sole condition that he is able to make it available, and he then transfers the note to an assignee, who sues the maker, and after suit brought the

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

- payee makes the account available to himself; this is no defence to the suit by the assignee, under the pleas of payment and set off. *Chilton v. Comstock*. 58.
3. A protest for non-acceptance of a bill which recited that on a day before the maturity of the bill it was received by the notary, presented, protested, &c., and at the close recites, "This done and protested at Mobile, aforesaid"—Held sufficient as to the time of presentment. *Lacy v. Holbrook, Bowman & Co* 88.
 4. The taking of a promissory note raises the presumption that a settlement is then made of all outstanding accounts between the parties, but this is a presumption which may be rebutted by other presumptions, or by other facts and circumstances. *Maynard & Co. v. Johnson*. 116.
 5. When the drawer resides in the vicinity of a town or city, a letter giving notice of non-payment deposited in the post office, and directed to him at the same town or city where the letter is deposited, is sufficient to charge him. *Carson v. The Bank of the State of Alabama*. 148.
 6. The negotiable quality of a promissory note is destroyed by the recovery of a judgment against its maker. And no right of action against an indorser can be then transferred to another so as to enable him to maintain an action in his own name. *Brown v. Foster*. 282.
 7. The holder's right of action against an indorser will exist only as an ordinary *chose in action* after the recovery of a judgment against the maker of a note—and it is questionable whether an equitable interest in it can be transferred without an assignment of the judgment. *Ibid*.
 8. A note payable to "The President and Directors of the Planters and Merchants Bank of Mobile," is, in its legal effect, a note payable to the corporation, and may be sued on as such. *Hazard v. The Planters and Merchants Bank* 299.
 9. Four persons constituting a firm in Tuscaloosa, afterwards established a new firm composed of themselves and eleven others, which was located under different names in Tuscaloosa, Mobile and New York. The old firm, before its dissolution, was indebted to the plaintiff, and to discharge this debt the acting partner of the house at Mobile, and who had been one of the old firm, drew a bill on the branch at New York, which was accepted by the acting partner there, who had also been one of the old firm. At the time the bill was drawn, the new firm was indebted to the members of the old firm in a large amount for goods sold, and at that time there stood also on the cash account of the house at Mobile, to the credit of the members of the old firm, a sum sufficient to cover the amount of the bill drawn: Held, that this was not the case of one partner giving the security of the firm for his individual debt, but that it was like any other case of indebtedness on the part of a firm, which any member of it could discharge by a payment in money, or by giving a security in its name. *Hester, Wilson, White & Co. v. Lumpkin*. 509.
 10. Where a note is made by an association of individuals as a banking company and it is made payable to one of themselves, or bearer, if it is put in circulation without any indorsement, a *bona fide* holder may institute suit in the name of the payee, for his use, against any other member of the association. *Elliott, use, &c. v. Montgomery*. 600.
 11. When a creditor receives a note from his debtor with other persons as security, and the note is made payable to a Bank, under the expectation that it will be discounted, the securities are not discharged by the refusal of the Bank to discount it, but the creditor may sue in the name of the Bank, or transfer the note

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

to another, who may in like manner use the name of the Bank to collect the money. *The Planters and Merchants Bank, use, &c. v. Blair & Morroh.* 613.

See Contract, 5, 6, 7.

See Partners and Partnership, 2.

See Pleading, 14.

See Indorser and Indorsee, 1.

BOND.

1. When the Judge of the County Court has taken the bond of a sheriff, and deposited it in the Clerk's office, he cannot withdraw the same and alter or vacate it, on the ground that it was not such as he had intended to approve. This being the case, an alteration made by him, though in a material part, will not affect its validity. *Harris et al v. Bradford.* 215.
2. The defendant in an attachment may have his action on the attachment bond, without having ascertained his damages by a direct action on the case against the plaintiff in the attachment. *Herndon v. Forney, et al.* 243.
3. The condition of a prison bounds bond is forfeited if the prisoner, at the expiration of sixty days after the execution of the bond, remains without the walls of the prison, he not having taken the benefit of the act for the relief of insolvent debtors. *McMichael and Shackelford v. Rapelye and Purdy.* 333.
4. E. & W. being appointed executors of S. qualified as such, and entered into the following bond: "Know all men by these presents, that we, Edward B. Elliott and Thompson Windham, executors of John Spencer, Hardin Perkins and Enoch Elliott, as sureties for said Edward B. Elliott, and William Glover and John Cummings as sureties for Thompson Windham, are held and firmly bound unto Hume R. Field, Judge of the County Court of Tuscaloosa county, and his successors in office, in the penal sum of thirty thousand dollars, to which payment well and truly to be made, we and each of us do bind ourselves, our heirs, &c. firmly by these presents. Sealed with our seals and dated this 24th January, 1827.

Now the condition of this obligation is such, that, whereas, the above bound Edward B. Elliott and Thompson Windham, have been duly appointed executors of the last will and testament of John Spencer, deceased—Now if the said Edward B. Elliott and Thompson Windham shall well and truly perform all the duties which are or may be by law required of them as such executors, then the above obligation to be void, else to remain in full force and virtue.

Witness our hands and seals the date above written.

E. B. ELLIOTT, [seal.]

THOMPSON WINDHAM, [seal.]

H. PERKINS, [seal.]

ENOCH ELLIOTT, [seal.]

W. Y. GLOVER, [seal.]

THOMAS CUMMINGS, [seal.]

Held—first, that as it was clearly the intention of the sureties to this bond not to bind themselves jointly for both executors, but severally for each, the bond would operate as the several bond of each executor, with his sureties, and was in effect the same as if separate bonds had been executed—second that there was nothing in the condition to contradict this intention, or to show that it was intended as a joint bond—third, the mere fact that the bond appears on its face to have been executed by *Thomas Cummings* instead of John Cummins, will not

BOND—CONTINUED.

render the bond void as to the other parties who executed it. *Elliott and Perkins v. Mayfield and Wife.* 417.

5. The official bond of a sheriff is a public document, which may be proved by a copy, certified by the Clerk of the County Court, in whose office it is directed by law to be deposited; it is no objection to the authentication that the attestation was made by the Clerk through his deputy, who certified the copy under his private seal, affirming that the public seal was lost or mislaid. *Godbold et al v. The Planters and Merchants Bank at Mobile.* 516.
6. A bond signed in blank may be afterwards filled up in a material part by the express authority of those who are to be bound by it, and will be as valid as if filled up before it was executed—such authority may be by parol. An authority to fill up and perfect the bond is an authority to redeliver it also. *Gibbs & Labuzan v. Frost & Dickinson.* 720.
7. An authority to perfect a bond by filling it up, given by parol, may be revoked in the same manner, and if revoked before the bond is perfected, the authority to perfect it, is at an end. *Ibid.* 721.
8. A blank writ of error bond will not operate as a supersedeas to the execution. *Ibid.*

See Chancery, 1, 2, 3, 4, 26, 27.

See Summary Proceedings, 1.

See Statutes, 6.

See Sureties, 3, 4.

See Evidence, 38.

See Power, 3.

CHANCERY.

1. A bond given to obtain an injunction in obedience to the fiat of the Chancellor will not operate as a *supersedeas*, or have the force and effect of a judgment upon a dissolution of the injunction, if it describes a different judgment from that sought to be enjoined by the bill. *Wirrell v. Munroe.* 9.
2. A bond executed to obtain an injunction of a judgment affirmed in the Supreme Court, which described only the judgment of the Court below, will not operate as a *supersedeas*, or have the effect of a judgment on a dissolution of the injunction. *Ibid.*
3. A bond so executed as to enjoin a judgment at law, has the force and effect of a judgment upon a dissolution of the injunction, without any order by the Chancellor to that effect. *Ibid.*
4. The statute which requires the Register to certify to the law court the fact that an injunction has been dissolved, is *mandatory* only, and the failure or refusal of the Register to certify the fact, will not prevent the plaintiff at law, from suing out execution on the injunction bond. *Ibid.*
5. When a purchaser with warranty is evicted by a title to which his covenants extend, and the vendor is insolvent, equity will restrain him from recovering the purchase money to the extent for which he is liable to the purchaser on his covenants of warranty. *Cullum v. The Branch of the Bank of the State of Alabama at Mobile.* 21.
6. Fraud committed by the vendor in the sale of land, by the concealment of an incumbrance, created by him—by means of which the purchaser is afterwards evicted, is relievable in equity by restraining the collection of the purchase mo

CHANCERY—CONTINUED.

- ney to the extent of the injury, or by an entire rescission of the contract, although the incumbrance is of record, and the conveyance is with warranty, covering incumbrances generally. *Ibid.*
7. There are cases in which the mere concealment of an incumbrance, has been held no ground to rescind the contract, when the incumbrance is removed before the hearing, but these cases rest upon the principle that no injury has resulted to the purchaser. *Ibid.*
 8. B. at the request of L. indorsed a note made by M. & L. as partners, which was discounted by a Bank; after the death of L. his administratrix and M. made a new note, for the purpose of continuing the indebtedness, which was also indorsed by B. and discounted by the Bank. This last note being unpaid, the Bank recovered a judgment against B. on his indorsement, which he satisfied, and filed his bill to charge the estate of M. upon the allegation that L. and the administratrix were insolvent—Held, 1. That the purchase of the second note by the Bank, relieved the intestate's estate from all liability to pay the debt. 2. The complainant was not entitled to the relief sought, that his only equity, so far as the intestate's estate was concerned, was to subject the interest of the administratrix and surviving partner therein, (if any,) to the payment of the amount paid as their indorser. *Brown v. Lang et al.* 50.
 9. *Semble*—An answer denying the matter charged in the bill, if uncontradicted, is conclusive evidence for the defendant; but the defendant must make out by proof matters stated by way of avoidance of the statements or charges of the bill. *Branch of the Bank of the State of Alabama at Huntsville v. Marshall et als.* 60.
 10. An affirmation in the answer need not be proved, if responsive to the stating or charging part of the bill, or an interrogatory authorized by either of them; but if the bill contains *nothing more* than the *stating* part, with a prayer that the defendant may answer, the complainant is not compelled to receive the defendant's oath beyond the mere denial of the equity of the bill. *Ibid.*
 11. Positive answers, responsive to the bill, are not outweighed by proof of facts which are not irreconcilable with the truth of the answers, and the fairness of the matters they state: and the more especially where each material fact is related only by a single witness. *Ibid.*
 12. It is no bar or defence to a bill, for an account and settlement of a partnership, that the defendant has been injured by the failure of complainant to perform his stipulations contained in the articles of copartnership. The defendant, in such a case, has his remedy by action at law on the articles. The practice in Courts of equity is to consider all stipulations in the articles, when not acted on by the parties, as if they were entirely omitted. *Boyd v. Mynatt.* 79.
 13. Where a partnership for the purchase and sale of lands existed between H. and four other persons of the first part, M. of the second part, and D. of the third part, upon a bill filed by H. in his own name against M. and D. for a settlement of the partnership accounts, alledging that he had purchased the interest of his associates, and making them defendants to the bill, M. and D. having denied all knowledge of this purchase and requiring proof of the fact—Held, that the answer of the associates of H. could not be read in evidence against M. and D. to prove the right of H. to sue in his own name. *Moore et als v. Hubbard et als.* 167.
 14. A final decree, confirming the report of the Master ascertaining the amount due and awarding execution thereon is sufficiently certain. *Ibid.*

CHANCERY—CONTINUED.

15. A bill of interpleader lies only where two or more persons claim the same debt or duty from the complainant, by different or separate interests. *Hayes, Ex'r.* *v. Johnson et al.* 267.
16. The bill alleged that the testator of complainant executed two notes to J. C. with J. as surety—that the testator was afterwards garnished by O & B. to answer whether he was not indebted to P. C.; that after his death, a jury, upon an issue made upon complainant's answer, found that the testator was so indebted, and judgment was rendered against her, in favor of O. & B. on the garnishment; that J. C. instituted a suit against J. as the surety of the testator, and recovered a judgment against him, which he discharged, and moved against the complainant for a judgment for the amount so paid as surety of the testator—Held, that this was not the case of two persons claiming the same debt, and that a bill of interpleader would not lie. *Ibid.*
17. The sheriff having an execution against G. entered thereon a fictitious levy of a slave, as the property of G. when, in fact, there was no such slave in existence, and took from G. a forthcoming bond, with F. & B. as his sureties for the delivery of the slave at a stipulated time. The bond being returned forfeited, and execution having issued thereon against the principal and sureties—Held, that the sureties could not be relieved in Chancery because the levy was fictitious. *Mead et als v. Figh & Blue.* 279.
18. A second mortgagee may pay the amount due on the first mortgage, when it is susceptible of ascertainment, without an account between the parties, and file his bill for the sale of the mortgaged premises; when the decree will be for the sale of the premises to pay his debt and the redemption money paid by him—or, if no obstacle exists to an account between the mortgagor and first mortgagee he may file his bill for foreclosure, making all persons in interest parties, and obtain a decree for a sale under both mortgages. *Cullum et al v. Erwin, Adm'r.* 452.
19. In such a case, if a dispute should exist between different defendants as to their respective rights to the avails of the mortgage, the Court could not settle the controversy between them upon their answers to the bill, but it would be necessary that a cross bill should be filed by them, or some of them, putting the matter in dispute in issue. *Ibid.*
20. A defendant cannot in his answer, pray any thing but to be dismissed the Court; if he has any relief to pray, or discovery to seek, he must do so by a bill of his own. *Ibid.*
21. The defendant having answered the bill, but no testimony being taken, the parties agreed in writing, that the complainants were heirs, as they described themselves, and to submit the cause to the Chancellor at the approaching term of the Court—Held, that this was a hearing on bill and answer by consent, and the answer under the rule of practice was to be taken as true in all respects. *White's Heirs v. The President &c. of the Florence Bridge Co.* 464.
22. A subsequent incumbrancer is not bound to pay off prior liens, to entitle him to sell the property to pay his debt; but it is competent for him to go into Chancery to coerce a sale, and after the payment of such liens, obtain whatever balance may remain. *Chambers et al v. Mauldin et al.* 477.
23. It is competent for a Court of Equity, under some circumstances, to remove one trustee and appoint another in his stead. *Ibid.*
24. A Court of Equity will not interfere between the parties to a contract, though it be executory, where no fraud has intervened, but will leave them to seek the re-

CHANCERY—CONTINUED.

- dress their contract provides for, unless there be some special ground of equitable interposition—as where in a sale of land the covenants are independent, and the vendor cannot make the title and is insolvent. *Long & Long v. Brown et al.* 622.
25. An allegation that the complainant has reason to fear, and does fear, that the defendant cannot make title, and will be unable to respond in damages, is too vague, loose, and uncertain to be the basis of any action in a Court of Chancery. *Ibid.*
26. It is no ground for granting or continuing an injunction to a judgment at law that there is a mistake in the description of lands in a bond for title, without also showing that the other party, on application, refuses to correct the mistake. *Ibid.*
27. In such a case, the correction can be made by the adult parties, though infants have an interest in the title bond. *Ibid.*
28. An injunction may be dissolved on the answer of one defendant, if he alone is charged with knowledge of the facts. *Ibid.*
29. The omission of an administrator to bring forward at the settlement of the estate, charges against it which he might have preferred, will not authorize the surety to have a re-settlement of the estate in Chancery, although the administrator may be insolvent. *Williamson v Howell et al.* 693.
30. When a sum of money is paid in part performance of a verbal contract, for the purchase of land, and the purchaser files a bill for specific performance and general relief, the vendor, if he relies on the statute of frauds as a bar to the performance of the contract, will be decreed to repay the sum received, with interest, although by the void contract it was to be forfeited unless other payments were made at other periods. When the defendant elects to consider such a contract as void, it is so in all its parts, and the vendor has no equity under such circumstances as will authorize an account to be taken of his losses, by reason of keeping the premises, contracted to be sold, unoccupied during the time he waited for the complainant to perform the contract, nor to have the same deducted from the sum received from the purchaser. *Mialhi v. Lassabe.* 712.
31. Where a suit was pending for the foreclosure of a mortgage and a sale of the premises, the solicitor of the complainants, with their approbation, received of a friend of the mortgagor a part of the debt intended to be secured, agreeing that he should *pro tanto* have a lien on the mortgaged property—Held, that the arrangement made the friend thus advancing money, an assignee in equity, to the extent of the sum advanced; that the mortgagor, or a junior incumbrancer, upon taking an account, could not avail themselves of it as a partial extinguishment of the debt; and further, that the friend was not a necessary party to the bill. *McMillan et al v. Gordon & Stoddard.* 716.
32. When it is necessary for a party to a bond, which, by statute, has the force and effect of a judgment, to resort to a Court of Chancery for relief against the bond, on the ground that it is not binding on him, the question will be considered in Chancery, as if it had arisen at law, upon the appropriate pleas. In such a case, Chancery is the appropriate forum to obtain relief. *Gibbs & Labuzan v. Frost & Dickinson.* 721.
33. A denial of the facts of the bill, by a party who is not charged with knowledge of them, and who in fact has not knowledge of them, will not cast on the complainant the necessity of establishing their truth by two witnesses. *Ibid.*

CHANCERY—CONTINUED.

34. Where a judgment at law is enjoined, upon the complainant executing a bond with surety, the injunction suspends the lien of the judgment. *Mansony & Hurltel v. The United States Bank and its Assignees.* 735.
35. An order appointing a receiver in a case in Chancery, and directing an attachment to issue against certain tenants, in possession of a part of the property in question, unless they attorned to the receiver within a prescribed time, is not such a final order or decree as can be reviewed on writ of error, while the cause is pending in the Court of Chancery. *Ibid.*
See Vendor and Vendee, 6, 7, 8.
See Husband and Wife, 1.
See Evidence, 12.
See Trust and Trustee, 3.
See Public Lands, 3.

CONSIDERATION.

- See Contract*, 2, 11, 12.
See Vendor and Vendee, 2.
See Deed and Registration of, 3, 4.

CONSTITUTIONAL LAW.

1. The constitutional provision which authorizes one charged with a crime, to be heard by himself or counsel, does not confer the right to make a statement of facts, independent of, and not warranted by, the evidence. *The State v. McCall.* 643.
See Statutes, 6.

CONSTRUCTION.

- See Practice at Law*, 14.
See Bond, 4.

CONTRACT.

1. The right of a purchaser of land to have a good title, is a right not growing out of the agreement of the parties, but which is given by law. *Cullum v. The Branch of the Bank of the State of Alabama at Mobile.* 21.
2. This right exists until the contract of the parties is determined by its execution on the part of the vendor, and when the conveyance has been executed by all the necessary parties, then the rule of *caveat emptor* applies with its utmost rigor. If the purchaser is afterwards evicted by a title to which his covenants do not extend, he is without relief, either in law or equity. *Ibid.*
3. When the holder of negotiable paper to which there exists an equitable defence, has given no consideration for its transfer, but it is held merely as a collateral security, to secure a debt due from the payee of the paper, it is open to the same defence as if it was held and owned by the payee. *Quere*, as to how the case would be if the note was not held merely as collateral security, and a new consideration was given either by the discharge of other paper or of other parties. *Ibid.*
4. A contract in writing, to deliver an article at a particular place, may be modified by a subsequent verbal contract, appointing a different mode of delivery. *Langford v. Cummings & Cooper.* 46.

CONTRACT—CONTINUED.

5. The terms "funds current in the city of New York," mean gold or silver, or something equivalent and convertible into the precious metals. *Lacy v. Holbrook, Bowman & Co.* 88.
6. A writing with a scroll in which is written the word "seal," at the end of the name of the party signing it, is not a sealed instrument; unless it appears from its body that the parties intended to give to it that character. *Carter and Carter v. Penn.* 140.
7. A promissory note to pay a sum in "current money of the State of Alabama," is, in legal effect, an undertaking to pay in gold or silver coin. *Ibid.*
8. An agreement by D. with W. a contractor for carrying the mail, to carry the United States express mail, on a section of ten miles, twice in twenty-four hours, for twelve months, for seven hundred dollars, to be paid quarterly, on the performance of the service, and to be accountable for any "miss mail," the cause of which occurred on that part of the route, is a dependant covenant. *Davis v. Wade.* 208.
9. The stipulation on the part of D. to be responsible for the injury arising from his failure to deliver the mail in time, was merely an agreement to set off the damage resulting from such omission against his compensation. *Ibid.*
10. The parties did not contemplate by that stipulation any failures but those accidental or casual ones which might arise under good management. If, therefore, such omissions were frequent, there would be a failure on the part of D. to perform his contract, and W. might annul the contract and resume the performance himself. *Ibid.*
11. When a written agreement between the plaintiff and defendant shows that the notes sued for were given for the price of an undivided moiety of a tract of land and a saw-mill, and which also contains an agreement that a co-partnership shall exist in the saw-mill, the breach of the contract with respect to the co-partnership, is no defence to the suit for the price of the land, because the agreement for the partnership forms no part of the consideration of the notes. *Durden v. Cleveland.* 225.
12. When M. in consideration of effects placed in his hands by G. promises J. to pay him a debt which G. owes him, and by repeated promises induces him to delay its collection for several years, having had ample time to ascertain the sufficiency of the fund in his hands, he will not afterwards be permitted to resist a recovery on the ground of the failure of the fund which was the consideration of the promise. *McKenzie v. Jackson.* 230.
13. If one man contract with another to serve him as an overseer for a year, and dies before the expiration of that time, his estate shall not be liable to respond in damages for a failure to serve for the stipulated period. *Gichan v. Dailey's Adm'rs.* 336.
14. Where one man agrees to serve another as an overseer for a year, and in consideration that he will do so, the employer undertakes to pay a sum *in numero*, the performance of the entire service is a condition precedent to the right to recover wages; and if the overseer die during the year, his personal representative cannot recover a *pro rata* compensation for the period he served. *Ibid.*
15. Where B. contracts with K. to build a house for such a price as was customary, and proceeded with the work, and afterwards K. left the State, whereupon P. promised verbally to pay B. according to the contract if he would go on and finish the work; this promise is collateral, and cannot be enforced under the

CONTRACT—CONTINUED.

- statute of frauds. *Quere*, as to how the law would be if the contract between B. and K. was repudiated before the promise by P. *Pucket v. Bates*. 390.
16. Where professional gentlemen agree with their client, that as it could not be known what business they would be required to perform, they would receive for their services what any gentleman of the bar would consider reasonable, this is an agreement to arbitrate, and will not bar an action. *The Bank of the State of Alabama v. Martin & Huntington*. 615.
 17. An agreement by counsel to attend to the litigated business of a Bank, pending and to be brought before the Courts, to the end of the then current year, does not oblige the counsel to attend to such as are undetermined at the end of the year. *Ibid*.
 18. Upon a refusal to execute the collateral engagement, the principal contract might be rescinded, by putting, or offering to pay, the party in *statu quo*; or it might be the foundation of an action for damages for its breach. *McNair and wife v. Cooper*. 660.
See Sale of Chattels, 1, 2, 3.

CORPORATIONS.

1. Although the charter of a Rail Road Company authorizes a sale of the stock of a subscriber for the non-payment of calls made thereon, yet an action of *assumpsit* will lie upon his subscription, which is a promise to pay. *Carlisle v. The Cahaba and Marion Rail Road Company*. 70.
2. Where a legislative act does not *per se* confer corporate powers, but contemplates some act to be done by the company, as the election of officers, &c., the act required must be done, to entitle the corporation to maintain an action against a subscriber for stock—the subscription being made prior to the time of the organization for which the charter provided. *Ibid*.
3. Where a promissory note was subscribed thus. "A. A. M. President W. & Coosa R. R. Company," the maker when sued may, under the general issue, or a plea stating the facts specially, defend himself against an action charging him personally, by proving that the note was made for and on account of the corporation designated, in virtue of an authority for that purpose, and so accepted by the payee. But a plea under which such a defence is intended to be made, must be verified by oath, according to the statute of this State. *McWhorter, v. Lewis, use, &c.* 198.
4. Where an act of the Legislature authorized the building of a bridge by means of stock to be subscribed, and after stock to a certain amount was subscribed, authorized the proprietors of a Ferry at the same place to subscribe their interest in the ferry and landings at an amount designated; if the owner of an interest in the ferry, &c., refuse to subscribe it, after the requisite amount of stock was taken, and the bridge is afterwards erected, his heirs cannot come in as stock holders, but will be concluded by the refusal of their ancestor. *White's Heirs v. The President &c. of the Florence Bridge Co.* 464.
5. A company was incorporated with a capital of one million of dollars, to be paid in, in cash, and such other money as it might receive in trust, one half of which capital of one million, it was required to invest in bonds or notes secured by mortgage on land within the State of Alabama, and the remaining half of the capital stock, together with the premiums and profits received by the company and the monies received in trust, might, in the discretion of the company, be invested in

CORPORATION—CONTINUED.

- stocks—loaned to any city, county, or company—or be invested in such *real or personal securities*, as it might deem proper—Held, that the company could not lend its *credit*, by making bonds to fall due in future, and exchange such bonds for the bonds of an individual for the same amount; and that the bond so taken was void. *Smith v. The Alabama Life Insurance and Trust Co.* 558.
6. Where the charter of a corporation authorized to lend money, enacts that certificates of stock shall be assignable on the books of the corporation, under such regulations as the Board of Trustees shall establish, it is competent for the trustees to declare by a by-law, that "No stockholder shall be permitted to transfer his stock of the Company while he is in default." *Cunningham v. The Alabama Life Insurance and Trust Company.* 652.
 7. An indebtedness by note comes within the prohibition of a general by-law, which declares that stock shall not be transferred so long as the holder is indebted to the Company. *Ibid.*
 8. Stock owned by an individual in an incorporated company, cannot be subjected to the payment of his debts by garnisheing the corporation. *Planters and Merchants Bank v. Leavens.* 753.
 9. A corporation can answer process of garnishment only under its common seal. *Ibid.*

COURT, CHARGE OF.

1. When the record shows good and bad pleas, upon all of which issues are joined to the country, and evidence is offered which supports the bad pleas only, it is no error for the Court to refuse to instruct the jury that the defendant is entitled to a verdict. The proper course in such a case is for the defendant to request the Court to charge that a verdict ought to be returned for him on the plea proved. *Cullum v. The Branch of the Bank of the State of Alabama at Mobile.* 22.
2. The statement of the evidence shows, that a custom upon a particular river was proved, and the Court refused to charge that usage by *one boat* would not constitute a custom. The refusal is proper, because no foundation for the charge appears from the evidence. *Langford v. Cummings & Cooper.* 46.
3. Two contracts in evidence before the jury, and a charge is requested on one aspect of the case, and given with the explanation that the question is not involved, and directing the attention of the jury to the other question, is not error. *Ibid.*
4. It is the duty of a Court, when a proper charge is requested, to respond directly to the charge asked for, and the refusal to give an appropriate charge cannot be justified by afterwards giving one less extensive, but equally free from error. *Maynard & Co. v. Johnson.* 116.
5. When a cause is submitted to a jury on two counts of a declaration, one of which is bad and the other good, and the evidence sustains the bad count only, it is not error to refuse to charge that the plaintiff is entitled to recover generally. If the plaintiff wishes a verdict on such evidence, he must request the Court to charge the jury that he is entitled to a verdict on that count only to which his evidence applies; the evidence showing no legal cause of action. *Upson v. Austin.* 124.
6. When charges are requested and refused by the Court, and no evidence is stated in the bill of exceptions, connecting the charges with the case, they will be

COURT, CHARGE OF—CONTINUED.

deemed abstract, and their correctness will not be reviewed. *Hollinger v. Smith.* 367.

See Evidence, 26.

See Practice at Law, 27.

COURT, SUPREME.

See Practice at Law, 16.

CRIMINAL CASES, AND PROCEEDINGS IN.

1. The expiration of the term of a Court operates, *ipso facto*, to discharge a jury who are deliberating upon the case of one indicted for a capital offence, and the recital of the facts on the record cannot prevent a second trial; nor will errors of law in empannelling the first jury, entitle the prisoner to a discharge from the prosecution. *Lore v. The State.* 173.
2. Where, after the commission of a crime, the law in respect to grand and petit jurors is modified by the legislature, and the State and accused are each entitled to a greater number of challenges, the trial will be had according to the new law. *Ibid.*
3. A Court organized under the act of 1832, "to provide for the speedy trial of slaves and free persons of color," ceases to possess the power to proceed further in the case submitted to it after it has tried the accused and pronounced the judgment of acquittal or condemnation; consequently if its judgment is erroneous, and reversed by a higher Court, the case should not be *remanded*, but if further proceedings are proper, it should be tried *de novo*. *The State v. Abram.* 272.
4. When one of the Justices of the Peace composing a Court, organized under the act of 1832, for the trial of slaves, withdraws from the Bench after the trial is entered upon, and his place is supplied by another, and for that cause a judgment of condemnation is reversed, the prisoner cannot be said to have been in jeopardy, and he may be tried again; and this although the judgment of reversal does not award a *venire facias de novo*. *Ibid.*
5. The act of 1832, in providing a tribunal for the trial of slaves, &c. does not exclude the jurisdiction of the Circuit Court in such cases, which is conferred by the constitution itself. *Ibid.*
6. Where several persons are indicted and found guilty of a conspiracy, a motion in arrest of judgment will be entertained at the instance of any one or more of them, although the others are not in Court, and may have actually escaped from custody. *The State v. Corington et al.* 603.
7. The breaking open the shutters of a window, and protruding the hand within them, is not such an entry as will constitute the crime of burglary, if the sash remain down, and the glass is not broken, so as to permit a violation of the security of the house. *The State v. Mc Call.* 643.
8. The constitutional provision which authorizes one charged with a crime, to be heard by himself or counsel, does not confer the right to make a statement of facts, independent of, and not warranted by, the evidence. *Ibid.*
9. Where the undertaking of sureties was for the appearance of their principal to answer the charge of the State against him, on his failing to appear, the recognizance was forfeited, and it was not necessary to call the sureties to produce their principal. *The State v. Hinson et al.* 671.

CRIMINAL CASES AND PROCEEDINGS IN—CONTINUED.

10. A judgment rendered on a forfeited recognizance must follow the condition ; if that is joint the judgment must be joint also. *Ibid.*
11. A judgment cannot be rendered against the sureties to a recognizance for a larger sum than the penalty. *Ibid.*

COVENANT.

1. An action of covenant may be maintained on an attachment bond. *Hill v. Rushing and Wood.* 212.
See Contract, 8, 9, 10.

DAMAGES.

1. The measure of damages to which an Attorney is liable for failing to perform his undertaking with his client, is the loss which has resulted from his negligence. *Mardis' Adm'rs. v. Shackleford.* 494.
2. Upon a refusal to execute the collateral engagement, the principal contract might be rescinded, by putting, or offering to put, the party in *statu quo*; or it might be the foundation of an action for damages for its breach. *McNair and Wife v. Cooper.* 660.
3. The measure of damages in an action for a breach of a warranty of title on the sale of personal property, cannot exceed the damages sustained by the vendee. *Salle v. Light's Ex'rs, use, &c.* 700.
See Vendor and Vendee, 13.
See Evidence, 36.

DEED AND REGISTRATION OF.

1. The act of 1828, [Digest 203, §5,] which avoids all deeds of trust of personal property as against creditors and subsequent purchasers, unless recorded within thirty days, does not extend to a deed of trust assigning choses in action as security for a debt. *McCain v. Wood.* 258.
2. A deed assigning "all debts due to the grantor from persons in the State of Alabama for medical services," without any schedule of names or sums, is not void for uncertainty. *Ibid.*
3. When a deed of trust expresses a legal consideration, it is not void *per se* because the amount of debts, &c. assigned by it is not set out or the names of the debtors specified. *Ibid.*
4. When the contest is between a creditor and a grantee of a trust deed to secure another creditor, the consideration of the deed must be shown, and it is not proved by the recitals in the deed, or by the admissions of the grantor at the time of its execution. *Ibid.*
5. Where a father conveys all his estate to his son, under circumstances which possibly might lead to the conclusion that a trust was intended for the grantor, but the transaction is free from fraud, the deed cannot be avoided or personal property conveyed by it recovered, in a court of law. *Morris v. Harvey.* 300.
6. If the conveyance under such circumstances express a consideration which was never paid, or if the same was in fact paid, these circumstances will not, as between the parties, avoid the deed. *Ibid.*
7. A deed of assignment made by a debtor conveying his property to a trustee, with power to collect and sell and apply the proceeds to the payment of certain creditors; first, those named in schedule B. according to the order in which they were set down ; second, those enumerated in schedule C. *pari passu*, and with.

DEED AND REGISTRATION OF—CONTINUED.

- out priority or partiality, and lastly all other persons having legal demands against the debtor—and also giving to the trustee the power and discretion of departing from such order and enumeration, if by such departure any compromise or settlement could be effected, advantageous to the debtor or his creditors—declared void, because made with the intent to delay, hinder and defraud creditors—and that such intent was apparent on the deed. *Gazzam v. Poyntz*. 374.
8. A deed of assignment can be sustained, only where the property conveyed by the deed is *bona fide* devoted to the payment of the creditors, without stipulating for any benefit to the debtor, and where the equitable interests of the creditors are fixed and determined by the assignment itself. *Ibid*.
9. The act of 1828, [Aik. Dig. 208, §5.] requiring deeds and conveyances of personal property to be recorded, applies to mortgages of personal property. *Magee v. Carpenter*. 469.
10. Deeds conveying personal property may be admitted to record on the oath of one witness, where there is but one to the deed. *Ibid*.
- See Fraud*, 3.
- See Partners and Partnership*, 3.
- See Trust and Trustee*, 1.
- See Ejectment and Trespass To try Title*, 2.

DEMURRER TO EVIDENCE.

1. In a demurrer to evidence it was stated that the Cashier and assistant Cashier deposed that they believed, and had no doubt, that notice of non-payment of a bill was deposited in the post office, directed to the drawer; that their belief did not arise from any recollection of the fact, as connected with the bill sued on, but from the course of business of the Bank—it was held that from this evidence a jury might properly infer that the usual course of business of the Bank furnished sufficient facts to warrant this belief; and if the party against whom such evidence is offered omits to inquire what this course of business is, he will not afterwards be heard in asserting that nothing is proved by it. *Carson v. The Bank of the State of Alabama*. 148.
2. On a demurrer to evidence all reasonable presumptions are made against the party demurring; and the Court is not bound to render judgment in conformity with what should have been the verdict of the jury, *but with what it legally could have been*. *Dearing, Sink & Co. v. Smith & Wright*. 432.
3. Where two persons named D. were sued as partners with S one of them with S. submitted to a judgment by *nil dicit*, and the other denied making the note sued on; on the trial of the cause a witness stated that "he had always understood that Mr. D. was a member of the firm,"—*Held*, that this evidence was sufficient on a demurrer to evidence to authorize the inference that the Mr. D. who had pleaded was the one to whom the witness referred. *Ibid*.
4. It will not be intended, in the absence of all proof, (even against a party demurring to evidence,) that a sheriff returned an execution placed in his hands, before the time when, by law, it was returnable. *Woodward v. Harbin*. 534.

DEPOSITION.

1. An affidavit that "*some*" of the witnesses of the plaintiff reside out of the limits of the State, is not sufficient to authorize a commission to issue to take depositions. *Leane v. Pomphrey*. 77.

DEPOSITION—CONTINUED.

2. When the Clerk omits to state what notice shall be given to the adverse party, of the time and place of taking it, the deposition cannot be read unless the party offering it prove that the notice actually given was sufficient. *Ibid.*
3. It is not a sufficient cause to suppress a deposition that the certificate of the commissioner omits to show that it was taken within the hours named in the commission—reciting that pursuant to the commission the witness was caused to come before the commissioner on the day named in the commission. *Sandford & Cleaveland v. Spence.* 237.
4. A second deposition may be taken without leave of the Court first obtained for that purpose, but cannot be read to the jury but by leave of the Court, which would not be given but upon a proper showing, and also producing and confronting the first with the second deposition. Such permission is matter of discretion, and cannot be reviewed in this Court. *Hester, Wilson, White & Co. v. Lumpkin.* 509.
5. A deposition taken upon an affidavit that the witness is about to leave the State cannot be read on the trial of the cause, if the witness does not carry his purpose into effect, but remains within the State. *The Commercial Bank of Columbus v. Whitehead.* 637.
6. A deposition cannot be read which the Commissioner certified was taken on the second day of November, the commission requiring it to be taken on the first day of November. Nor will the defect be aided by the proof of a witness that he received the deposition on the first day of November, but did not know when it was taken. *Collins v. Fowler.* 647.
See Evidence, 19.

DETINUE.

1. Where an action of detinue is brought against two, and a verdict is found against one, and in favor of the other, in the absence of any thing in the record to show the character of the caption and detention, they may, on error, be intended to be tortious, and a judgment according to the finding be sustained. *Salter v. Pearce.* 669.

DOWER.

1. The statute in relation to the manner of obtaining and assigning dower, is cumulative, and does not exclude all other modes; and an assignment of dower, though irregularly made, to which the wife has given her assent, is obligatory upon her; especially if she takes possession of the land allotted to her, and there is no evidence that she has been overreached by fraud. *Johnson, Adm'r, et al v. Neil and Wife.* 166.
2. As the widow holds her dower from her deceased husband, or rather by appointment of law, it is not indispensable to the validity of its assignment that it should be made by deed or instrument in writing. *Ibid.*
3. The widow of an intestate is entitled to dower in the lands of which her husband died seized, notwithstanding the administrator may have reported his estate insolvent. *Allen v. Allen's Adm'r.* 556.

EJECTMENT AND TRESPASS TO TRY TITLE.

1. The act for the relief of tenants in possession against dormant titles, [Dig. 652,] gives a cumulative remedy, and does not repeal the common law rule; therefore when a defendant in an action of trespass to try titles, is in possession, under

EJECTMENT AND TRESPASS TO TRY TITLE—CONTINUED.

- color of title, and is not a mere trespasser, he is entitled to set off the value of the permanent improvements against the value of the use and occupation. *Hollinger v. Smith*. 367.
2. Where a map is referred to in a grant or deed, as indicating what is intended to be conveyed, it is considered as a part of the conveyance, and may be referred to for the purpose of aiding in the identification of the land, showing its form, location, &c. *Doe ex dem Miller v. Cullum*. 576.
 3. Whether a monument, or boundary referred to in a conveyance, is identical with that found upon the ground, and which is supposed to answer to it, is when disputed, a question of fact for the jury. *Ibid*.
 4. It cannot be assumed as a legal conclusion, because a plot accompanying a survey, and which traces its lines, seems to indicate the point of beginning to be at or near the mouth of a branch running into a navigable stream, that, therefore, the mouth of the branch shall ever after be regarded as the starting point in measuring the land, or ascertaining its location. *Ibid*.
 5. A plaintiff in ejectment must recover on the strength of his own title, and if that is not sufficient to enable him to maintain the action, it is unimportant what the title of the defendant is. *Brock et al v. Yongue et al*. 584.
 6. When the plaintiff in ejectment claims by a sale under execution, it is not necessary that he should deduce a regular chain of title subsisting in the defendant in execution; it is sufficient if he shows a legal title in the defendant at the time of the rendition of the judgment. *Ibid*.
 7. The judgment in ejectment is binding only on the parties thereto and their privies; and one whose possession is distinct from that for which the action is brought, cannot be ousted by an execution. But the defendant by a transfer of his possession *pendente lite*, cannot defeat the action; the plaintiff, notwithstanding, may proceed to judgment and eject the assignee. *Howard and Holman v. Kennedy's Ex'rs*. 593.
 8. Where under a judgment by default against the casual ejector, a person in possession who was a stranger to the proceeding, and claiming under a title *prima facie* valid, distinct from and disconnected with the plaintiff's, is ejected, the judgment and execution may be set aside, and the person thus ousted let in to defend the action. *Ibid*.

ERROR AND WRIT OF.

1. When a party pleads specially facts which may be given in evidence under the general issue, which is also pleaded, if the Court should erroneously sustain a demurrer to the plea, the judgment will not be reversed for that cause, as no injury is caused thereby. *McKenzie v. Jackson*. 230.
2. Where the service of notice of a suggestion was effected on the sheriff only, and the judgment entry recites that "the defendant came by his attorney," &c. and a judgment is rendered on verdict against "the defendant," the inference is, that the sheriff is the party against whom the recovery is had; and his sureties can't join with him in the prosecution of a writ of error. *Garay et al v. Wood*. 296.
3. An order declaring that a previous order had been complied with, and adjudging that the cause to which it relates be stricken off the docket, is not revisable on writ of error; but if injustice results from it, the appropriate remedy is by writ of *mandamus*. *Stephenson et al v. Mansony*. 317.
4. The mother of a bastard child should not be made a party to a writ of error

ERROR AND WRIT OF—CONTINUED.

- prosecuted by the father, but the Judge of the County Court, who is considered as the legal plaintiff in the judgment, should be made the defendant. *Trawick v. Davis*. 328.
5. A garnishee who has answered and admitted an indebtedness to the defendant or some one else equal to the amount of the recovery against him, may, notwithstanding, sue out a writ of error. *Fortune v. The State Bank*. 385.
 6. A judgment rendered by default against a garnishee, on the third day of the term to which he is summoned, is erroneous and will be reversed on error. *Randolph v. Peck & Co*. 389.
 7. A decree of the Orphans' Court was rendered between the same parties, that a certain sum be paid by the one party to the other as guardians, &c. that another sum be paid them for services, and that a farther sum be paid them for monies advanced, and concludes by ordering that execution issue for these several sums—*Held*, that a writ of error which proposes to revise the decree in respect to one only of the sums adjudged to be paid, cannot be sustained; but to authorise an appellate Court to take jurisdiction the entire decree should be brought up. *Booker's Ex'rs. v. Jemison and Stewart*. 408.
 8. A second deposition may be taken without leave of the Court first obtained for that purpose, but cannot be read to the jury but by leave of the Court, which would not be given but upon a proper showing, and also producing and confronting the first with the second deposition. Such permission is matter of discretion, and cannot be reviewed in this Court. *Hester, Wilson, White & Co. v. Lumpkin*. 509.
 9. When a motion by one, who shows *prima facie* that he was illegally dispossessed under a judgment and execution in ejectment, has been made to set the same aside, is overruled, the plaintiffs the motion may prosecute a writ of error. *Howard and Holman v. Kennedy's Ex'rs*. 592.
 10. An order appointing a receiver in a case in Chancery, and directing an attachment to issue against certain tenants, in possession of a part of the property in question, unless they attorned to the receiver within a prescribed time, is not such a final order or decree as can be reviewed on writ of error, while the cause is pending in the Court of Chancery. *Mansony and Hurtell v. The United States Bank and its Assignees*. 735.
See Court, Charge of, 1.
See Pleading, 16.
See Practice at Law, 24, 27.
See Lien, 2.

ESTATES OF DECEASED PERSONS.

1. When Commissioners appointed by a Judge of the Supreme or Circuit Court to settle an estate in which the Judge of the County Court is interested, act under the appointment, the record of the County Court should set out the commission under which they assume to act. *Woodruff v. The Bank of the State of Alabama et al*. 292.
2. Such Commissioners are invested with all the powers appertaining to the County Judge with reference to the estate committed to their supervision. *Ibid*.
3. They are authorized to make a final distribution of the assets among the creditors, and to render a decree for the amount due to each person. *Ibid*.
4. When such a decree is made, a short stay of execution may be allowed to give

ESTATES OF DECEASED PERSONS—CONTINUED.

- the administrator the opportunity to pay the several creditors, without incurring the costs of an execution. *Ibid.*
5. The County Court, on the final settlement of an estate, has no jurisdiction to render judgment against any person but the representatives of the estate to be settled. *Jones and Connor v. Jemison and Stewart.* 632.
 6. To constitute fraud in the settlement of an estate, the legatees or those interested in it, must collude with the administrator. *Williamson v. Howell et al.* 693.
- See Executors and Administrators, 6.*
See Dower, 3.
See Sureties, 6, 7.

EVIDENCE.

1. In order to charge the husband with knowledge of a fact, it is not permissible to shew that it had been spoken of in his family, and before his wife; especially if he had no such interest in the matter as to warrant the conclusion that the wife repeated to him what she had heard. *Oden v. Stubblefield.* 40.
2. The declarations of a person in respect to personal property, of which he is in possession, are admissible as part of the *res gestæ.* *Ibid.*
3. In slander, the words charged to have been spoken, or at least some of them, must be proved to have been spoken precisely as laid, and it will not be sufficient to prove the speaking of words of equivalent import. *Williams and Wife v. Bryant and Wife.* 44.
4. The charge in the declaration, that a woman was called "a whore," is not established by proving that she was called "a strumpet." *Ibid.*
5. The belief a witness is not evidence, but if his impressions are stated and not excepted to, nor any charge requested with respect to such testimony, there is no question raised on the record. *Langford v. Cummings & Cooper.* 46.
6. Evidence of an offer on the part of the defendant in execution to transfer his property to another for the purpose of delaying creditors, cannot be given in evidence to affect the claimant who subsequently purchased the same property from the defendant in execution. *Oden v. Rippetoe.* 68.
7. Nor is such evidence admissible with the limitation that it shall only affect the claimant, if subsequent evidence will authorize the jury to infer that the claimant received the property under the same circumstances. *Ibid.*
8. When legal testimony is united with, and offered together with illegal testimony, as a whole, although the Court may do so, it is not bound to separate the good from the bad but may reject the whole. *Smith et als v. Zaner et als.* 99.
9. The original record of a suit is competent evidence, although an exemplified copy would have been sufficient. *Lawson v. Orear.* 156.
10. Proof by the grantee of a deed that he deposited it in the post office, directed to another, at a different office, and this person deposes that he never received it—afterwards application is made personally to both the post offices, and also to the General Post Office by letter, and the deed is not found, this is sufficient to let in secondary evidence. *McRae, Adm'r. v. Pegues, Adm'r.* 158.
11. Parol evidence of the contents of a deed is improper, when it is shown that the party offering is in possession of a true copy. *Ibid.* 159.
12. A bill in equity is not evidence of the facts stated in it against the complainant, unless sworn to by him. *Durden v. Cleveland.* 225.
13. Where a motion is made to exclude *all the testimony* given by a witness, a

EVIDENCE—CONTINUED.

- port of which is admissible, the Court is not bound to distinguish the legal from the illegal evidence, but may overrule the motion *in toto*. *Hrabowski's Ex'r's. v. Herbert, Daniel & Co.* 265.
14. The admission of record by the plaintiff that the suit is brought for the use of another, has no effect against the defendant in the action except to exclude admissions made by the nominal plaintiff pending the suit. *Brown v. Foster.* 282.
 15. Books of accounts kept by a deceased clerk, and other entries or memoranda, made in the course of business or duty, by any one who would at the time have been a competent witness to the fact which he registers, are admissible evidence; and where the book or memoranda in which the entry is made, is lost, then a copy, supported by the oath of the party who copied it, is admissible. *Batre v. Simpson.* 305.
 16. An administration bond is an official document appertaining to the administration, and cannot be removed from the office of the Clerk of the Orphans' Court, without a breach of his official duty—when necessary to be given evidence an examined copy, or one verified by the certificate of the proper officer, is sufficient, without producing or accounting for the original. *Miller v. Gee.* 359.
 17. Admissions of the owner of a note that it has been paid, may be given in evidence in a suit brought for the use of another, it not appearing that he had any interest in the notes when the admissions were made. *Remy, use, &c. v. Duffee.* 365.
 18. A custom that the merchants of Mobile retain bills and notes paid by them for their country customers, until the end of the year for settlement, may be given in evidence. *Ibid.*
 19. It is competent for a merchant to establish an account by proof that the entry on his book is in the handwriting of a deceased clerk, who is proved to have been correct and accurate in making his charges; and where a deposition professes to set out an exact copy of the entry, as thus, "500 doz. cut glass beads, at 30 cts. \$100," it is evidence to show that at least one hundred dollars was due for the articles charged; the plaintiff claiming only that sum by his declaration, the fair inference is, that the sale was made at twenty cents the dozen, and the mistake was made by the commissioner or scrivener who wrote the deposition. *Everly v. Bradford.* 371.
 20. A declaration for an injury to cattle is not supported by evidence of injury done to mules. The term cattle, in its usual and ordinary acceptation in this State does not include mules. *Brown v. Bailey.* 413.
 21. One who signs a note on behalf of a steamboat and its owners, is a competent witness to show that the principals were indebted to the payee. *Childress et al v. Miller, use, &c.* 447.
 22. J. S. declared against the defendants for the negligence of their intestate in failing, as an Attorney at Law, to collect "sundry notes and accounts," and offered in evidence a paper subscribed by the intestate, which is in these words—"Notes sent Philpot for Smith's horse, (here the notes are described, by stating the names of the makers and their amounts.) "Left with me F. & H's. note for \$70. due on the 1st January, 1829, to bring suit on." Held, that this paper unexplained by other proof, was irrelevant and inadmissible; but under the count for money had and received, the acknowledgement that F. & H's. note was left with the intestate was admissible as a link in the chain of testimony necessary to show its amount, or the plaintiff's title to the money collected thereon. *Mardis' Admr's. v. Shackelford.* 494.

EVIDENCE—CONTINUED.

23. Where evidence is adduced which is pertinent, but insufficient, the party against whom it is offered, should ask the Court to instruct the jury as to the application and legal effect of the testimony, instead of objecting to its admission. *Ibid.*
24. Where an objection is made to the admission of a writing, part only of which is inadmissible, the Court is not bound to distinguish between the different parts, but may overrule the objection in *toto*. *Ibid.*
25. If the subscribing witness to a bond be dead, proof of the handwriting of the obligor is admissible to establish its execution. *Ibid.*
26. The official bond of a sheriff is a public document, which may be proved by a copy, certified by the Clerk of the County Court, in whose office it is directed by law to be deposited; it is no objection to the authentication that the attestation was made by the Clerk through his deputy, who certified the copy under his private seal, affirming that the public seal was lost or mislaid. *Godbold et al v. The Planters and Merchants Bank at Mobile.* 516.
27. Whether a monument, or boundary referred to in a conveyance, is identical with that found upon the ground, and which is supposed to answer to it, is when disputed, a question of fact for the jury. *Doe ex dem Miller v. Cullum.* 576.
28. It cannot be assumed as a legal conclusion, because a plot accompanying a survey, and which traces its lines, seems to indicate the point of beginning to be at or near the mouth of a branch running into a navigable stream, that, therefore, the mouth of the branch shall ever after be regarded as the starting point in measuring the land, or ascertaining its location. *Ibid.*
29. The act of 1806, makes a legatee a competent witness to establish a will by declaring his legacy to be void. *Perkins v. Windham.* 634.
30. The maker of a promissory note is not a competent witness for the defendant who had indorsed it for his accommodation, in a suit by the holder against such indorser, without a release for the costs of the suit. *The Commercial Bank of Columbus v. Whitehead.* 637.
31. The reasonableness of the charge of a physician cannot be established by a witness proving what the same physician had charged him in a similar case. *Collins v. Fowler.* 647.
32. Where there is a parol executory agreement, made at the time of the execution of a note, if the collateral contract be not executed, it cannot be given in evidence to defeat the action on the note. *McNair and Wife v. Cooper.* 660.
33. A witness proved that he had purchased a tract of land from the plaintiff's testator, and proposed to sell it to the defendants, who refused to buy the land unless the notes to be given for the purchase could pass into the possession of the Selma Rail Road Company, which was indebted to them; that this conversation was afterwards communicated by witness to the testator of the plaintiffs, who said that the notes of defendants would answer his purposes as cash, in payment of his stock to the Rail Road Company. Held that this testimony was irrelevant, on the ground that it did not tend to show what the contract really was, which the parties subsequently made. *Ibid.*
34. The cases of *Murchie v. Cook & McNab.* 1 Ala. 42; of *Simonton v. Steele*, id. 357; and of *Honeycut v. Strother*, 2 ib. 135, examined and explained. *Ibid.*
35. When a claim is interposed by a trustee, for the wife, the husband is not a competent witness. *Hall v. Dargan.* 696.
36. In an action by the vendee of personal property against the vendor upon a warranty of title, a judgment against the vendee at the instance of a third person, claiming to be the rightful owner, of which suit the vendor had no notice, is not

EVIDENCE—CONTINUED.

evidence to prove that the title of the latter was defective. But it seems, that such judgment is admissible to prove the amount of damages recovered; and is conclusive of the invalidity of the vendor's title, if it was obtained without fraud or collusion, upon notice given to him of the pendency of the action. *Salle v. Light's Ex'rs, use, &c.* 700.

37. An agent who purchases goods for his principal, which are, without the consent of the agent, seized by the sheriff, by virtue of an execution against the agent, in favor of a third person, and sold to satisfy the judgment, is a competent witness in a suit by the principal against the sheriff for the trespass. *Bush v. McGee.* 710.

38. When two or more persons have a common object in view, the declarations of one, in the presence and hearing of all, in furtherance of the common purpose, and uncontradicted by them, must be considered as the declaration of all.—Therefore when L. against whom four judgments had been obtained, and executions issued thereon, went to the Clerk's office with two other persons, as his intended sureties to obtain writs of error to the Supreme Court, and to execute bonds to supersede the executions, which the Clerk commenced preparing by proceeding to fill up the blanks kept in the office for that purpose, when L. interposed, and in the presence and hearing of his sureties, stated that he had not time to wait until the bonds were filled up, and requested that they might be executed in blank, by him and his sureties, which was accordingly done, and a statement handed to L. that the executions were superseded—Held, that this was an express authority to the Clerk to fill up the blanks in the bond, both on the part of the principal and the sureties. *Gibbs & Labuzan v. Frost & Dickinson.* 720.

See Chancery, 9, 10, 11, 13.

See Bills of Exchange and Promissory Notes, 4.

See Husband and Wife, 2.

See Sheriff and Sureties, 3, 12.

See Partners and Partnership, 1.

See Forcible Entry and Detainer, &c. 8.

See Demurrer to Evidence, 3.

See Ejectment and Trespass to Try Title, 2, 6,

EXECUTION, WRIT OF.

1. Where writs of *fi. facias* against the same defendant are at different times placed in the sheriff's hands, who levied them *simultaneously* on all the defendant's property in his reach, but did not sell under either, if the property is only sufficient to satisfy those, the lien of which had first attached, the sheriff is not liable to judgment at the suit of a plaintiff in one of the junior *fi. fa's*, upon a suggestion that the money could have been made thereon by due diligence. *Smith et als v. Hogan.* 93.
2. Where a *fi. facias* is received by a sheriff, before his term of office expires, and without any action thereon by him, is handed over to his successor, the latter must execute the writ. *Lawson v. Orear.* 156.
3. The Marshal of the United States is not liable to a surety for omitting to levy on the property of his principal, or for making a false return of no property, although by the omission to levy the surety is eventually compelled to satisfy the judgment. The Marshal owes no duty at common law to the surety, and therefore is not responsible to him. *Gregg v. Crawford.* 180.

EXECUTION, WRIT OF—CONTINUED.

4. Under the statute directing the sheriff or other officer having an execution against more than one, to levy upon the property of the principal in the first instance, the officer is not liable to an action at the suit of the surety, for an omission to levy on the property of the principal, unless the statutory affidavit is made by the surety. *Ibid.*
5. The sheriff having an execution against G. entered thereon a fictitious levy of a slave, as the property of G. when, in fact, there was no such slave in existence, and took from G. a forthcoming bond, with F. & B. as his sureties for the delivery of the slave at a stipulated time. The bond being returned forfeited, and execution having issued thereon against the principal and sureties—Held, that the sureties could not be relieved in Chancery because the *levy* was fictitious. *Mead et als v. Figh & Blue.* 279.
6. An execution issued on a judgment which the sheriff has discharged by paying the amount to the plaintiff in execution is not void, but may be set aside by the defendant in execution as having irregularly issued. If he omits or declines to do so, no one else can take advantage of it. *Fournier v. Curry.* 321.
7. When an execution on a judgment has been sued out within a year and a day after its rendition, and returned *nulla bona*, it is not irregular to issue another execution after a lapse of eight years. *Scull v. Godbolt.* 326.
8. Where the owner of a freehold, by a parol agreement, permits another to have a house which he had erected, to do with as he will, and with a view to its severance from the freehold; by this agreement the house becomes a chattel, and may be levied on and sold as the property of him who is invested with the ownership. *Foster v. Mabe.* 402.
9. It is the duty of the sheriff to have personal property present at the time and place of sale, but if this is not done, and a sale made, the property being absent, the sale is not void, but the purchaser acquires the title, subject to be divested by the order of the Court from which the execution issued, setting it aside. *Ibid.*
10. A judgment was rendered against B. W. by a Justice of the Peace, who made an entry on his docket thus, "Stayed sixty days, R. H. Ware security;" an execution issued against B. W. and R. H. W. which was levied on B. W.'s property, and a forthcoming bond executed with R. H. W. as surety; afterwards an execution issued on the forthcoming bond, and was levied on R. H. W.'s property—Held, that although there was no stay bond, and the first execution was void as to R. H. W. yet it would not be avoided so as to affect the levy on B. W.'s property; and consequently the execution issued on the forthcoming bond would not be set aside. *Gilleland, use, &c. v. Ware.* 414.
11. In general it is irregular to sue out a second execution when a sufficient levy has been made which remains undisposed of, in consequence of a forthcoming bond; but such a bond is not a satisfaction of the judgment, and if the condition is broken, the plaintiff may sue out a new execution on the judgment, or against the defendants to the same and the sureties on the bond. *Quere*, how far the lien of the judgment or first execution is continued or destroyed. *Hopkins v. Land.* 427.
12. By statute, a plaintiff is authorized to sue out more executions than one, but at his own cost; whenever therefore a forthcoming bond is forfeited and it is necessary to run executions to different counties, he may sue out one execution against the defendants to the judgment, and another against them and the sureties to the bond. *Ibid.*

EXECUTION, WRIT OF—CONTINUED.

13. The right of a mortgagor of slaves to the possession before default made may be sold under execution. *Algee v. Carpenter*. 469.
14. A levy and seizure by the sheriff of goods sufficient to satisfy the execution will as it respects the defendant in execution, be a satisfaction, although the goods be wasted by the sheriff. *Campbell, use, &c. v. Spence et al.* 543.
15. When a levy is made on property sufficient to satisfy the execution, and the plaintiff directs the sheriff to leave it with the defendant on his promise to have it forthcoming on the day of sale, and it is not so delivered, such levy will be regarded as a satisfaction of the execution as it respects junior judgment creditors. *Ibid.*
16. A levy and sale under a senior execution, will be considered a satisfaction as it respects a junior execution subsequently levied on other property of the defendant, although the sheriff may make a misapplication of the money, and the plaintiff in the senior execution will be remitted to his claim against the sheriff. *Ibid.*
17. A writ of execution should be made returnable to the term of the Court next succeeding its *teste* when issued more than fifteen days previous to the return day of the next succeeding term; but if issued when there is a less number of days, it should then be made returnable to the next succeeding term thereafter. *Harrell et al v. Martin, Pleasants & Co.* 650.
18. Where an original *fi. fa.* was issued in the lifetime of the defendant, and returned unexecuted, an *alias* or *pluries fi. fa.* issued after his death, will not authorize the levy on, and sale of, lands of which the defendant died seized. *Lucas v. Doe ex dem Price*. 679.
19. Where several judgments for the same debt are recovered against the surviving partner and the administratrix of the deceased partner, the latter cannot, by paying the amount due, and obtaining an assignment of the judgment against the former, continue the same in force and have execution thereof in the name of the plaintiff, in order to her reimbursement. *Bartlett & Waring v. McRae*. 688.
20. *Quere?* Is not an original, or *alias fieri facias*, issued after the defendant's death, a nullity as it respects the lands of which he died the proprietor. *Mansony and Hurtell v. The United States Bank and its Assignees*. 735.
See Statutes, 1, 9.
See Chancery, 4.
See Sheriff and Sureties, 9, 13.
See Executors and Administrators, 5.
See Lien, 1, 4.
See Supersedeas, 1, 2.
See Indorser and Indorsee, 2.

EXECUTORS AND ADMINISTRATORS.

1. An administrator wishing to make final settlement should present his accounts to the Judge of the County Court, whose duty it is to audit and state them, and report them for allowance at a succeeding term, at least forty days notice being given. *Taylor and Wife et als v. Reese, Adm'r.* 121.
2. In an action against a surety to an administration bond, it is necessary to shew that assets came to the hands of the administrator, and the surety is responsible only to the extent of the devastavit. After the plaintiff has shown what amount

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- of assets came to the hands of the administrator, it rests with the defendant to show that they have been lawfully appropriated. *Miller v. Gee*. 359.
3. The act of 1832, [Aik. Dig. 253.] which authorises an execution to issue against the surety of an executor to his official bond upon a return of "no property found," to an execution issued on a decree of a County Court against the executor, was intended to embrace bonds executed prior to its passage, but was not intended to retroact upon decrees of the Orphans' Court rendered prior to the passage of the law. The act is constitutional. *Elliott and Perkins v. Mayfield and Wife*. 417.
 4. In this State it is unlawful for an administrator to sell the personal estate of his intestate at private sale, and if such sale is made, it conveys no title to the purchaser. *Wier v. Davis and Humphries*. 442.
 5. A *bona fide* purchaser from an administrator, cannot be deprived of his possession in the property sold, by an execution in favor of a creditor against the administrator, to be levied of the goods and chattels of his intestate in his hands, when the execution issues after the sale, although the sale itself is illegal. Such a sale, if accompanied with possession, leaves nothing in the administrator but a mere right of action for the slave, and this is not the subject of levy or sale; nor is the property itself in the possession of the purchaser subject to levy. *Ibid*.
 6. The statute does not require that a claim against the estate of a deceased person shall be presented to all the personal representatives, where there are more than one; nor does it impose upon the creditor the necessity of presenting the evidence by which the demand is sustained. *Mardis' Adm'rs. v. Shackleford*. 494.
 7. The administratrix of the transferee having divided the slaves according to the agreement, and delivered them to those entitled, a part of whom were left with her to assist in gathering the crop, and which she afterwards refused to deliver, in an action against her for the recovery of the slaves—Held, that if the original agreement to divide the slaves was fraudulent, the division made by her was void; but if the agreement was *bona fide*, the division was good, as she was merely doing voluntarily what a Court of Chancery would have compelled her to do. *Dearman v. Dearman and Coffman*. 521.
 8. An administratrix cannot dispose of the property of the estate by *private sale*, and such a sale, though for a full consideration, will be void as against heirs, distributees and creditors. *Ibid*.
 9. An administrator *cum testamento annexo*, who is appointed upon the failure of the executors to qualify, cannot execute a power to sell lands conferred upon the latter by the will. *Lucas v. Doe ex dem Price*. 679,
See Evidence, 16.
See Bond, 4.
See Lien, 4.
See Sureties, 6, 7.
See Estates of Deceased Persons, 6.

EXCEPTIONS, BILL OF.

See Practice at Law, 23.

FORCIBLE ENTRY AND DETAINER.

1. By going to trial in an action of forcible entry and detainer without objection to the regularity of the process, the return of the sheriff, and the form of the com-

FORCIBLE ENTRY AND DETAINER—CONTINUED.

- plaint, all objections thereto are waived and cannot be made on error. *Wright v. Lyle*. 112.
2. The Justice of the Peace may grant a new trial in a case of forcible entry and detainer. *Ibid*.
 3. A possession peaceably acquired will be converted into a forcible and unlawful detainer by a refusal to yield the premises on demand, and forcibly retaining it. Nor is it necessary that a demand to quit should be in writing, unless there was a previous tenancy, under which the possession was first acquired. *Ibid*.
 4. The description of the land in the complaint must convey a distinct or definite idea of the land sought to be recovered; but if no objection is taken to it in the Court below, it will be aided by the verdict and judgment if they identify the lands with reasonable certainty. *Ibid*.
 5. In an action for an unlawful detainer, the plaintiff is not a competent witness to prove the service of the notice in writing for the delivery of possession of the premises sought to be recovered. *Stinson v. Gosset*. 170.
 6. An action for an unlawful detainer, under the statute, cannot be maintained unless the defendant entered as a tenant of the estate, or is in possession of the same by, from, under or by collusion with such tenant—but it need not be shown that the tenancy was created by the plaintiff, if he is entitled to the possession as a remainder man, or as owner of the reversion. *Ibid*.
 7. The act which requires a Justice of the Peace in a suit of forcible entry to note on his docket the reasons for the admission or rejection of evidence, is directory merely, and the omission will not prejudice either party. *Clark v. Stringfellow*. 353.
 8. The defendant in a forcible entry suit, cannot give in evidence a sheriff's deed to show a determination of the plaintiff's title. The question to be tried is with respect to the actual possession, and no controversy can be raised as to the merits of the title. *Ibid*.
 9. Where a tenant of the plaintiff voluntarily surrenders possession to the defendant upon a claim of title, this entry is by collusion with or under the tenant, and therefore the entry is within the act. *Ibid*.
 10. Although the landlord may be permitted by a Justice to defend the possession of his tenant when sued for a forcible entry, yet the judgment is properly entered against the tenant in possession. *Ibid*.

FORTHCOMING BOND.

1. In general it is irregular to sue out a second execution when a sufficient levy has been made which remains undisposed of, in consequence of a forthcoming bond; but such a bond is not a satisfaction of the judgment, and if the condition is broken, the plaintiff may sue out a new execution on the judgment, or against the defendants to the same and the sureties on the bond. *Quere*, how far the lien of the judgment or first execution is continued or destroyed. *Hopkins v. Land*. 427.
2. By statute, a plaintiff is authorized to sue out more executions than one, but at his own cost; whenever therefore a forthcoming bond is forfeited and it is necessary to run executions to different counties, he may sue out one execution against the defendants to the judgment, and another against them and the sureties to the bond. *Ibid*.

See Lien, 3.

FRAUD.

1. Where the contract of sale has been executed by the purchaser's acceptance of a conveyance, fraud cannot be urged as a defence to an action *at law*, for the price agreed to be paid. *Cullum v. The Branch of the Bank of the State of Alabama at Mobile*. 21.
2. Fraud committed by the vendor in the sale of land, by the concealment of an incumbrance, created by himself by means of which the purchaser is afterwards evicted, is relievable in equity by restraining the collection of the purchase money to the extent of the injury, or by an entire rescission of the contract, although the incumbrance is of record, and the conveyance is with warranty, covering incumbrances generally. *Ibid*.
3. The mere neglect of a trustee to sell property, conveyed to him by the grantor, cannot defeat the object of the trust. *Quere?* Would the omission of the trustee to execute the trust for an *unreasonable time*, with the knowledge or assent of the *cestui que trust*, lead to the conclusion that the deed was fraudulent *Cowling v. Douglass*. 206.
4. The possession of a mortgagor, when consistent with the deed, is not a badge of fraud—therefore, where a mortgage was made to secure the mortgagees as sureties on three notes falling due at different times, with power to sell at the happening of the first default, the mortgagees may permit the property to remain in the possession of the mortgagor until the happening of the last default. *Magee v. Carpenter*. 469.
5. A father and son join in a conveyance of slaves, the property of the son, to another son, with an understanding that the transferee should hold the slaves during his life, or until the children of the father come of age, and then to be divided among those children. The conveyance was made from the apprehension that the creditors of the father, who had once owned the property, would seize it for his debts—Held that the slaves were not liable for the debts of the father, such an agreement, though it might be suspicious, would not necessarily be fraudulent. *Dearman v. Dearman and Coffman*. 521.
See Vendor and Vendee, 8.
See Bailment, 1, 2.
See Deed and Registration of, 5, 6, 7, 8.
See Executors and Administrators, 7.

FRAUDS, STATUTE OF.

1. A person in possession of personal property as an agent, may acquire a title in favor of creditors and purchasers, where the property is given or lent to him, with a reservation to the giver or lender; unless the reservation is in writing and duly acknowledged, &c. and recorded, or a demand of possession is made and pursued by due course of law within three years. And, although a sum of money was paid by such donee, or loanee, as hire, it would not, as it respects his creditors and purchasers, prevent a divestiture of the donor or lender's reservation. *Oden v. Stubblefield*. 49.
2. A voluntary deed, if delivered to the donee, will pass the title to slaves, as between the donor and his representatives although not proved or acknowledged, as required by the statute of frauds. *McRae, Adm'r. v. Pegues, Adm'r*. 159.
3. M. & G. being partners, dissolved, and M. & A. covenanted with G. on receiving the goods and effects of the old firm to discharge its debts, and also to pay certain debts which G. owed individually, among which was a debt due J. which M. by parol afterwards promised J. to pay him—Held, that this was an original

FRAUDS, STATUTE OF—CONTINUED.

undertaking, and not a promise to pay the debt of another within the statute of frauds, and that the agreement between M. & A. & G. by which the former covenanted to pay the debt of J. is merely the inducement to the promise upon which the action was founded. *McKenzie v. Jackson*. 239.

4. Where B. contracts with K. to build a house for such a price as was customary, and proceeded with the work, and afterward K. left the State, whereupon P. promised verbally to pay B. according to the contract if he would go on and finish the work; this promise is collateral, and cannot be enforced under the statute of frauds. *Quere*, as to how the law would be if the contract between B. and K. was repudiated before the promise by P. *Pucket v. Bates*. 390.

See Deed and Registration of, 7, 8.

See Chancery. 30.

GARNISHEE.

1. The act of 1840, [Meek's Sup. 172] authorizing the mode of proceeding upon the answer of a garnishee, extends to garnishee process upon judgments as well as original and judicial attachments. *M Cain v. Wood*. 258.
2. When the answer of a garnishee discloses that another person has, or claims, an interest in the debt, such third person should be cited to appear. *Payne v. The Mayor and Aldermen of Mobile*. 333.
3. The answer of a garnishee making a special statement of facts, from which it is inferable that he was once indebted to the defendant in attachment, but that he has been notified by a third person that he is the proprietor of the debt, and demands payment, does not authorize the rendition of a judgment against the garnishee. But in such case the plaintiff may contest the answer, and submit an issue to the jury. *Fortune v. The State Bank*. 385.
4. Where the answer of a garnishee states that a third person sets up a claim to the debt admitted to be owing, the act of 1840 requires a notice to be given to that person; and it seems that two notices returned "not found," are equivalent to personal service, so that the statute applies even where he resides without the State. *Ibid*.
5. A garnishee who has answered and admitted an indebtedness to the defendant or some one else equal to the amount of the recovery against him, may, notwithstanding, sue out a writ of error. *Ibid*.
6. Where the judgment recites that the garnishee had answered at the last term that he was indebted to the defendant, &c., and an answer is copied in the transcript which appears to have been then verified, that answer will be considered by the appellate Court as a part of the record. *Ibid*. 386.
7. A judgment rendered by default against a garnishee, on the third day of the term to which he is summoned, is erroneous and will be reversed on error. *Randolph v. Peck & Co*. 389.
8. J. H. C. and W. A. G. being partners, the latter, upon the dissolution of the firm, agreed to pay the former a specified sum of money for his interest, and the former expressed a wish that the latter would pay the money to his brother S. W. C. to whom he said he was indebted. The latter replied that it was immaterial to him to whom he paid the money. Subsequent to this, W. A. G. was garnisheed by the plaintiff, a creditor of J. H. C., and the jury having found J. H. C. was indebted to S. W. C. at the time of the transfer of the debt to him—held that the money in the hands of W. A. G. was not subject to the garnishment of the plaintiff. *Lovely v. Caldwell*. 684.

GARNISHEE—CONTINUED.

9. Stock owned by an individual in an incorporated company, cannot be subjected to the payment of his debts by garnisheing the corporation. *Planters and Merchants Bank v. Leavens*. 733.
10. A corporation can answer process of garnishment only under its common seal. *Ibid*.

GUARDIAN AND WARD.

See Action, 1.

GIFT.

1. A deed of gift, if delivered to the donee, will pass the title to slaves as effectually as if the slaves themselves were delivered. *McRae, Adm'r. v. Pegues, Adm'r*. 159.
See Frauds, Statute of, 2.
See Fraud, 5.

HUSBAND AND WIFE.

1. A marriage took place in Virginia in 1797. After a few years cohabitation the husband and wife separated—the husband left the State of Virginia, came to this State, and in 1817 married another woman, who was ignorant of the first marriage, and who had two children by her supposed husband; the first wife, after the separation, had two illegitimate children. In 1837 the husband by deed conveyed all his property, real and personal, to trustees, for the benefit of the second wife and children, reserving to himself an annuity of a thousand dollars a year during his life, and died in 1839. Upon a bill filed by the first wife to set aside this deed, to have dower allotted to her in the real estate, and for her distributive share of the personalty—Held, that the second wife and children were purchasers for a good consideration of the property conveyed by the deed, and that as their equity was at least as good as that of the first wife, a Court of Chancery would not interfere. *Ford v. Ford et als*. 142.
2. A marriage may be proved by cohabitation as man and wife, reputation, &c., in all cases except on a trial for bigamy, or in an action of *crim. con.* *Ibid*.
3. Where a father by will gives to his son a slave until the slave attained the age of twenty-one years, and the remainder of the life of the slave to his daughter, then a married woman—Held, that the right of the husband to the slave was perfect on the assent of the executor to the legacy, that the possession of the tenant of the particular estate was the possession of the tenant in remainder—and that the right of the slave survived to the husband upon the death of the wife before the termination of the particular estate. *Pitts v. Curtis*. 350.

INDORSEMENT.

1. The assignment of a note by the payee, in these words, "For value received, I indorse the within note to H. & B. and warrant the payment of the same," does not impose an absolute and unconditional liability, but is a promise to pay to the assignee if the maker is unable to do so. *Douthitt v. Hubson & Brockman*. 110.
2. A debt to fall due in future for services to be afterwards rendered may be transferred by assignment before the services are rendered, and such transfer, if *bona fide*, will defeat an attachment subsequently sued out against the transferrer. *Payne v. The Mayor and Aldermen of Mobile*. 333.

INDORSEMENT—CONTINUED.

3. The act of June, 1837, inhibits the bearer of a bond or note from suing thereon in his own name, unless he can deduce a title to the same by indorsement; consequently, where a note was payable to S. L. or bearer, an action could not be maintained upon it by J. J. or bearer, for the use of S. L. —the same not appearing to have been indorsed to J. J. or any one else. *White v. Joy, use, &c.* 571.

See Practice at Law, 8, 9.

See Statutes, 4.

See Indorser and Indorsee, 2.

INDORSER AND INDORSEE.

1. Where the assignor of a note is Judge of the County Court of the county where the suit must be brought against the maker, it will be sufficient to charge the assignor to bring such suit to the next Circuit Court of the county. *Holt v. Moore.* 394.
2. The discharge of the maker of a promissory note, when arrested on a *ca. sa.* by his creditor, is not such a satisfaction of the debt as to relieve the indorser from his liability to the creditor upon the indorsement. *Quarles v. Glover.* 674.
3. A prior indorser is not entitled to have satisfaction entered upon a judgment against him, when the bill indorsed by him is paid by a subsequent party and the judgment prosecuted for his benefit; but under no circumstances has the claimant, in the trial of a right of property, the right to inquire into the execution. *Hall v. Dargan.* 696.

INSOLVENT DEBTORS.

See Bond, 3.

INTENDMENTS AND LEGAL PRESUMPTIONS.

1. When the record recites that "the defendant failed to file his plea within the time prescribed by law," a memorandum of pleas found in the record, will be presumed not to have been filed within the time prescribed by law, and therefore properly disregarded. *J. C. & J. Crosby v. Lassiter.* 201.
2. When the judgment entry recites that an issue was joined, but the record does not contain a plea, it will be intended that the plea was a mere denial of the case stated by the plaintiff. *Gary et al. v. Wood.* 296.
3. It will not be intended, in the absence of all proof, (even against a party demurring to evidence,) that a sheriff returned an execution placed in his hands, before the time when, by law, it was returnable. *Woodward v. Hurbin.* 534.

See Sheriff and Sureties, 10, 11.

See Process, Service of, 3.

See Verdict, 2.

INTEREST.

1. It seems that when the occupation has been of any value to the purchaser, the vendor, upon the rescission of the contract, will be entitled to interest on the purchase money, as a remuneration for the occupation from the time of the purchase until the offer to rescind, and until the abandonment. *Cullum v. The Branch of the Bank of the State of Alabama at Mobile.* 21.

See Vendor and Vendee, 6.

JUDGMENT AND DECREE.

1. A bond given to obtain an injunction in obedience to the fiat of the Chancellor will not operate as a *supersedeas*, or have the force and effect of a judgment upon a dissolution of the injunction, if it describes a different judgment from that sought to be enjoined by the bill. *Wigwell v. Munroe*. 9.
2. When a cause is carried to the Supreme Court by writ of error and execution superseded by bond, the judgment of the Court below is merged in the judgment of affirmance of the Supreme Court. *Ibid*.
3. A bond executed to obtain an injunction of a judgment affirmed in the Supreme Court, which described only the judgment of the Court below, will not operate as a *supersedeas*, or have the effect of a judgment on a dissolution of the injunction. *Ibid*.
4. A bond so executed as to enjoin a judgment at law, has the force and effect of a judgment upon a dissolution of the injunction, without any order by the Chancellor to that effect. *Ibid*.
5. When the husband and wife are sued for a debt of the wife, while sole, the judgment must be against both, and if judgment be rendered against the husband alone, it will be reversed on error. *Gray v. Thacker, use*, §c. 136.
6. A judgment *de bonis testatoris* is erroneous when the declaration sets out a cause of action created by the administrator in his own name and right, although he is described as an administrator in the declaration. *Oliver, adm'r. v. Hearne & Whitman*. 271.
7. A judgment rendered on a forfeited recognizance must follow the condition; if that is joint the judgment must be joint also. *The State v. Hinson et al.* 671.
8. A judgment cannot be rendered against the sureties to a recognizance for a larger sum than the penalty. *Ibid*.
9. Where a judgment at law is enjoined, upon the complainant executing a bond with surety, the injunction suspends the lien of the judgment. *Mansony & Hurtell v. The United States Bank and its Assignees*. 735.
See Practice at Law, 1, 2, 3, 12, 23, 23.
See Lien, 1, 2.
See Execution, Writ of, 15.
See Supersedeas, 1, 2.
See Execution, Writ of, 18.
See Partners and Partnership, 7.

JUSTICES OF THE PEACE.

1. It is competent for a Justice of the Peace to quash an execution issued by himself, and a party prejudiced by a refusal to quash, may remove the proceeding into a higher Court by *certiorari*. *Gilliland, use*, §c. v. *Ware et al.* 414.
2. A Justice of the Peace has no authority under the attachment laws of this State, to issue an attachment returnable into the County or Circuit Court of any other county, than that for which he is appointed. *Caldicell v. Meador*. 755.
See Execution, Writ of, 10.

LANDLORD AND TENANT.

1. By a purchase of land at sheriff's sale, the purchaser is invested with the title of the defendant in execution. If, therefore, the defendant is a tenant, his landlord cannot be permitted to become a co-defendant. *Lawson v. Orear*. 156.

LEGACY AND DISTRIBUTIVE SHARE.

1. The Commissioners have no power to ascertain the value of property brought into *hotch pot*; such value must be ascertained by the Judge of the County Court, or by a jury under his directions. *Taylor and Wife, et als. v. Reese, Admr.* 121.
2. A child who has been advanced by the parent in his lifetime, refusing to bring such advancement into *hotch pot*, thereby relinquishes all his interest as distributee of the estate. *Ibid.*
3. Where a father by will gave to his son a slave until the slave attained the age of twenty-one years, and the remainder of the life of the slave to his daughter, then a married woman—Held, that the right of the husband to the slave was perfect on the assent of the executor to the legacy, that the possession of the tenant of the particular estate was the possession of the tenant in remainder—and that the right to the slave survived to the husband upon the death of the wife before the termination of the particular estate. *Pitts v. Curtis.* 350.
4. The act of 1806, makes a legatee a competent witness to establish a will by declaring his legacy to be void. *Perkins v. Windham.* 634.
5. A devise to a parent for life, and afterwards to his or her children, is not avoided as it respects the parent, by the children proving the will as subscribing witnesses; though the latter cannot claim their residuary interest under the will.—*Ibid.*

See Orphans' Court, 5.

LIEN.

1. The *lien* created by a judgment on lands is co-extensive with the State, but a *bona fide* purchaser under a *fieri facias*, issued on a junior judgment would be protected. *Campbell, use, &c. v. Spence.* 543.
2. Where the execution is superseded by the suing out a writ of error and giving bond with surety, the *lien* of the judgment is discharged. *Ibid.*
3. The execution of a forthcoming bond, or bond to try the right of property, does not impair the *lien* of the judgment. *Ibid.*
4. Where a creditor omits to sue out execution until after the death of his debtor, no lien attaches upon his personal estate, in the hands of his administrator, who is bound to apply them in due course of administration, and whose claim will prevail against the levy made under an execution issued after the death of the debtor. *Blount and Stanley v. T aylor.* 667.
5. Where a judgment at law is enjoined, upon the complainant executing a bond with surety, the injunction suspends the *lien* of the judgment. *Mansony and Hurtell v. The United States Bank and its Assignees.* 735.
6. *Quere?* Is not an original, or *alias fieri facias*, issued after the defendant's death, a nullity as it respects the lands of which he died the proprietor. *Ibid.*

See Mortgage, 9.

LIMITATIONS, STATUTE OF.

1. The statute of limitations in favor of an Attorney who is charged with negligence in the performance of a professional engagement, begins to run from the time he became liable to an action, although the damage may not be developed, or become definite, until sometime afterwards. And an Attorney who undertakes to collect notes &c. by suit, must sue to the first Court, to which, with *reasonable diligence*, suit could be brought; if he fails, he is suable immediately. *Mardis' Admr. v. Shackleford.* 495.

MANDAMUS.

1. Where an attachment ancillary to an action brought in the usual manner, is improperly dismissed, a *mandamus* is the appropriate remedy in order to its reinstatement; and a rule will be awarded requiring the Judge of the proper Court to show cause why a peremptory writ should not issue, although notice has not been given that the motion will be made. *Borain & Co. v. Da Costa*. 393.
2. When a suit is commenced in the name of a person without his consent, and carried on for the benefit of another who claims an interest, the plaintiff on the record is authorized to dismiss the suit unless indemnity is given him against the costs; but the erroneous action of an inferior Court in allowing such a plaintiff to dismiss his suit can only be corrected by *mandamus*. *Brazier v. Turver*. 569.

MASTER AND SLAVE.

1. The owner of a slave is under a moral and legal obligation to supply his necessary wants. While the slave remains under his protection, he is the judge of the extent of his wants, but cannot absolve himself from this obligation by voluntarily permitting the slave to be absent from him, unless he provides some person to stand in the relation of master to the slave. *Gibson v. Andrews*. 66.
2. The hirer, where no agreement to the contrary is made, is responsible for medical services rendered to the slave during the period for which he is hired; but if such hirer should permit the slave to be absent from him, the owner would be responsible for necessary medical services as well as the hirer. *Ibid*.

MORTGAGE.

1. A second mortgagee may pay the amount due on the first mortgage, when it is susceptible of ascertainment, without an account between the parties, and file his bill for the sale of the mortgaged premises; when the decree will be for the sale of the premises to pay his debt and the redemption money paid by him—or, if no obstacle exists to an account between the mortgagor and first mortgagee he may file his bill for foreclosure, making all persons in interest parties, and obtain a decree for a sale under both mortgages. *Cullum et al v. Erwin, Admr.* 452.
2. In such a case, if a dispute should exist between different defendants as to their respective rights to the avails of the mortgage, the Court could not settle the controversy between them upon their answers to the bill, but it would be necessary that a cross bill should be filed by them, or some of them, putting the matter in dispute in issue. *Ibid*.
3. If, when the cause is ripe for a decree of foreclosure, the defendants claiming under a prior mortgage should not have taken the necessary steps to enable the Court to adjust their rights to the fund, the complainant should not be delayed for that cause, but the decree should be that the fund arising from the sale under the first mortgage be brought into Court, subject to its future disposition. *Ibid*.
4. The assignment of a note, secured by a mortgage on land, is, if not otherwise expressed, an assignment, *pro tanto*, of the mortgage also, and if the fund arising from the mortgage is not sufficient to pay the entire debt secured by it, the assignee will be entitled to a preference over the mortgagee. *Ibid*.
5. Where several notes, secured by the same mortgage are assigned at different times, if the fund arising from the sale of the mortgaged premises is not sufficient to pay all the notes, the assignees will be entitled to priority of payment in

MORTGAGE—CONTINUED.

- the order in which the assignments were made, and not according to the time of the falling due of the notes, unless the assignor, at the time of the assignment, gave a preference to one or more in the mortgage. *Ibid.*
6. The right of a mortgagor of slaves to the possession before default made may be sold under execution. *Magee v. Carpenter.* 469.
 7. Such default will not be presumed from the fact merely that one instalment of the debt, to secure which the mortgage is due. *Ibid.*
 8. The possession of a mortgagor, when consistent with the deed, is not a badge of fraud—therefore, where a mortgage was made to secure the mortgagees as sureties on three notes falling due at different times, with power to sell at the happening of the first default, the mortgagees may permit the property to remain in the possession of the mortgagor until the happening of the last default. *Ibid.*
 9. A subsequent incumbrancer is not bound to pay off prior liens, to entitle him to sell the property to pay his debt; but it is competent for him to go into Chancery to coerce a sale, and after the payment of liens, obtain whatever balance may remain. *Chambers et al v. Mauldin et al.* 477.
 10. The grantor of slaves conveyed on deed, in trust for the payment of a debt with a power of sale, is not liable for hire so long as he is permitted to retain their possession; but if he transferred the possession to a third person, that person, after a demand of him by the trustee entitled to the possession, will be accountable for hire. *Ibid.*
 11. Where a suit was pending for the foreclosure of a mortgage and a sale of the premises, the solicitor of the complainants, with their approbation, received of a friend of the mortgagor a part of the debt intended to be secured, agreeing that he should *pro tanto* have a lien on the mortgaged property—Held, that the arrangement made the friend thus advancing money, an assignee in equity, to the extent of the sum advanced; that the mortgagor, or a junior incumbrancer, upon taking an account, could not avail themselves of it as a partial extinguishment of the debt; and further, that the friend was not a necessary party to the bill. *McMillan et al v. Gordon & Stoddard.* 716.
 12. The mortgagee of land entitled to the possession, or to the rents, may recover of a tenant holding under a lease from the mortgagor, the rents accruing subsequent to the time when the former became entitled; unless previous to the notice the tenant paid them to the mortgagor; and in such cases the statute dispenses with the necessity of attornment. *Mansony and Hurtell v. The United States Bank and its Assignees.* 735.
See *Trust and Trustee*, 5.

ORPHAN'S COURT.

1. The Commissioners have no power to ascertain the value of property brought into *hotch pot*; such value must be ascertained by the Judge of the County Court, or by a jury under his directions. *Taylor and Wife et als. v. Reese, Adm'r.* 121.
2. A return made by the Commissioners, received by the Court, and ordered to be recorded, will be presumed to be correct until the contrary is shewn. *Ibid.*
3. An administrator wishing to make final settlement should present his accounts to the Judge of the County Court, whose duty it is to audit and state them, and report them for allowance at a succeeding term, at least forty days notice being given. *Ibid.*

ORPHANS' COURT—CONTINUED.

4. Minors should have guardians appointed to protect their interests at the settlement. *Ibid.*
5. The defendant in error cannot object to a reversal on the ground that the interest of the plaintiff in the matter of litigation was not propounded in the Court below. In cases where distribution is sought in the Orphan's Court, it is the correct practice for the plaintiff to set out his right to distribution; if he neglects to do so, the administrator may compel him to do it by filing an exception; but if this is omitted, he cannot afterwards, on error, question the right. *McRae, Adm'r. v. Pegues, Adm'r.* 158.
6. The County Court, on the final settlement of an estate, has no jurisdiction to render judgment against any person but the representatives of the estate to be settled. *Jones and Connor v. Jemison and Stewart.* 632.
See Estates of Deceased Persons, 1, 2, 3, 4, 6.
See Error, Writ of, 7.
See Statutes, 6.
See Sureties, 6, 7.

PARTNERS AND PARTNERSHIP.

1. Where a partnership for the purchase and sale of lands existed between H. and four other persons of the first part, M. of the second part, and D. of the third part, upon a bill filed by H. in his own name against M. and D. for a settlement of the partnership accounts, alledging that he had purchased the interest of his associates, and making them defendants to the bill, M. and D. having denied all knowledge of this purchase and requiring proof of the fact—Held, that the answer of the associates of H. could not be read in evidence against M. and D. to prove the right of H. to sue in his own name. *Moore et als v. Hubbard et als.* 187.
2. Where a bill of exchange is purchased by an unchartered company, with its own bills, in the usual course of its business, and suit is brought against an indorser, who is also a partner of the company, in the name of another partner, to whom the indorsement is filled up, it is a partnership transaction, and the suit in the name of the partner is merely colorable and cannot be maintained when it is shown that he has no interest in the bill, and that it belonged at the commencement of the suit, and yet belongs to the company. *Tipton v. Nance.* 194.
3. Where a partnership sues upon a covenant executed in the firm name, they admit that it is their deed, and the defendant cannot be allowed to object, that it is invalid, because a seal has been used by one of the partners to bind his copartners. *Dodge & McKay, surviving partners, v. McKay & McDonald.* 346.
4. Four persons constituting a firm in Tuscaloosa, afterwards established a new firm composed of themselves and eleven others, which was located under different names in Tuscaloosa, Mobile and New York. The old firm, before its dissolution, was indebted to the plaintiff, and to discharge this debt the acting partner of the house at Mobile, and who had been one of the old firm, drew a bill on the branch at New York, which was accepted by the acting partner there, who had also been one of the old firm. At the time the bill was drawn, the new firm was indebted to the members of the old firm in a large amount for goods sold, and at that time there stood also on the cash account of the house at Mobile, to the credit of the members of the old firm, a sum sufficient to cover the amount of the bill drawn: Held, that this was not the case of one partner giving the security of the firm for his individual debt, but that it was like any other case of indebtedness on the part of a firm, which any member of it could discharge by a payment in

PARTNERS AND PARTNERSHIP—CONTINUED.

money, or by giving a security in its name. *Hester, Wilson, White & Co. v. Lumpkin.* 509.

5. When partners sue on a note payable to the firm, proof of the partnership as alleged cannot be required, unless it is denied by a plea in abatement. *Bell v. Crosby & Co.* 575.

6. A clause in partnership articles, by which the partners agree that the partnership shall continue for a specified time, notwithstanding the death of one or more of the partners, has not the effect, even when considered in connection with the act of 1839, [Meek's Sup. 1-1.] to render the administrator of the estate of a deceased partner liable at law upon a contract made by the surviving partners.—*Edgar v. Cook, Adm'r.* 588.

7. Where several judgments for the same debt are recovered against the surviving partner and the administratrix of the deceased partner, the latter cannot, by paying the amount due, and obtaining an assignment of the judgment against the former, continue the same in force and have execution thereof in the name of the plaintiff, in order to her reimbursement. *Bartlett & Waring v. McRae.* 688.

See *Chancery*, 8, 12.

See *Contract*, 11.

See *Pleading*, 18.

See *Practice at Law*, 20.

See *Garnishee*, 8.

PLEADING.

1. In slander, the words charged to have been spoken, or at least some of them, must be proved to have been spoken precisely as laid, and it will not be sufficient to prove the speaking of words of equivalent import. *Williams and Wife v. Bryant and Wife.* 41.

2. When a matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than the defendant, then the declaration ought to state that the defendant had notice; but it is otherwise where both parties are supposed to be alike cognizant of the fact. *Cartlisle v. The Cahawba and Marion Rail Road Company.* 70.

3. In an action against a stockholder for instalments required to be paid upon his shares, it should be alleged by the company that the defendant had notice of the requisitions; but a general averment in the declaration, in these words, "of all which the defendant had notice," is sufficient on general demurrer. *Ibid.*

4. A plea admitting of two constructions will be construed most strongly against the pleader. *Lacy v. Holbrook, Bennett & Co.* 88.

5. Where the plaintiff declares on a special contract for building a house, and also on the common counts, for work and labor, a recovery may be had on the latter, without proving a special contract subsequent to and distinct from that declared on. The rule is, that a recovery may be had for work and labor, whenever the defendant has accepted the work, although it may not amount to a performance of the special contract. *Thomas & Trott v. Ellis & Co.* 103.

6. Where the contract is to pay a sum of money in promissory notes, due at a specified time, and to be endorsed by the defendant, it is not a sufficient breach to aver that "the defendant, though often requested, has not paid the said sum of money in the said promissory note specified." *Withers v. Knox.* 138.

PLEADING—CONTINUED.

7. A declaration in the plaintiff's name, although not signed by him, if placed on file, will be received as such. *Farley's Adm'r. v. Nelson.* 183.
8. Where the declaration omits to state the precise amount of damages, if necessary, reference may be had to the writ, but where the cause of action is a legal liability as the statute prescribes the rate of interest, damages need not be laid, either in the writ or declaration. *Ibid.*
9. Where a promissory note was subscribed thus, "A. A. M. President W. & Coosa R. R. Company," the maker when sued may, under the general issue, or a plea stating the facts specially, defend himself against an action charging him personally, by proving that the note was made for and on account of the corporation designated, in virtue of an authority for that purpose, and so accepted by the payee. But a plea under which such a defence is intended to be made, must be verified by oath, according to the statute of this State. *McWhorter, v. Lewis, use, &c.* 198.
10. When the affidavit of the truth of a plea is necessary, the want of it is a defect available on demurrer. *Ibid.*
11. In assigning the breaches in such an action, if the damages alledged to have been sustained exceed the penalty of the bond, it is proper to assign the non-payment of the penalty; if they do not amount to as large a sum as the penalty then the breach will be the non-payment of the damages actually sustained.—*Hill v. Rushing and Wood.* 212.
12. Actions upon attachment bonds are governed in all respects by the rules applicable to actions on the case for wrongfully suing out attachments, but the recovery never can exceed the penalty on the bond. *Ibid.*
13. The plaintiff who sues on a penal bond may frame his declaration on the penal part of the bond, without assigning breaches, and such a declaration is not bad when a condition is shewn on oyer. The proper course to compel an assignment of breaches, is to plead performance, or such other plea as will show a continuance of the condition. *Herndon v. Forney et al.* 243.
14. In a suit by the assignee against the assignor of paper not mercantile, it is necessary to aver in the declaration that suit was brought against the maker to the first Court after the maturity of the note to which suit could be brought, or an excuse for not bringing it. *Ryland v. Bates.* 312.
15. Where parties entered into a covenant by which they agreed to submit certain matters to arbitration, and each stipulated to perform particular duties consequent upon the making of the award; it is enough for the party suing for a breach of covenant, to allege a performance of every specific duty enjoined by his part of the contract, notice to the defendant that the award was made, and that he refused to comply with his engagement. *Dodge & McKay, surviving partners, v. McKay and McDonald.* 316.
16. Where an action is brought upon a covenant to submit to arbitration, alledging a failure by the defendant to perform an act which he had stipulated to do when the award was made, the defendant is not entitled to oyer of the award; but if it is craved and granted, the plaintiff cannot insist on error, that it was not regularly grantable. *Ibid.*
17. Upon a demurrer to the declaration, its sufficiency cannot be determined by a reference to the indorsement on the writ or other part of the record. *Ibid.*
18. It is not necessary in a suit against partners, to describe them as such in the writ. *Tarlton et al. v. Herbert.* 359.

PLEADING—CONTINUED.

19. A declaration for an injury to cattle is not supported by evidence of injury done to mules. The term cattle, in its usual and ordinary acceptation in this State does not include mules. *Brown v. Bailey*. 413.
20. The declaration alledged that J. A. C. then Clerk of the steamboat C. for and on behalf of the same, and the owners thereof, made and delivered to, &c. a promissory note, &c.—Held, that this did not amount to an allegation that the note was made under an authority for that purpose; and it could not be intended, from the nature of his employment, that the Clerk was authorized to bind his principals. *Childress et al. v. Miller, use, &c.* 447.
21. A declaration against an Attorney at Law, commencing in *assumpsit*, and alledging that he undertook to collect sundry notes and accounts, and concluding that "contriving to deceive and defraud," he negligently failed to perform his undertaking, is not demurrable as being both in *assumpsit* and *case*—in the conclusion unnecessary terms are employed, but they do not vitiate the declaration, or change the character of the action. *Mardis' Adm'rs v. Shackelford*. 493.
22. It is no objection to a declaration in a suit commenced by attachment, that it charges the defendant in custody, instead of stating that his estate was attached. *Miller et al v. Mc Millan*. 527.
23. The act of 1829, which imposes a penalty of forty dollars on any Justice of the Peace who shall perform any official act after his removal from the beat in which he was elected, is modified by the act of 1840, as it respects Justices elected for the city of Mobile; which latter act authorizes Justices of the Peace elected with in the city, to reside hold their offices, and transact official business in any beat within the same. Consequently, a plea in abatement, which alledges that a recognition was taken by a Justice of the Peace in the city of Mobile, after his removal from the beat for which he was elected, should negative his election in one of the beats of the city. *Powers and Bull v. The State*. 531.
24. In an action by an indorsee against an indorser, the latter need not plead in abatement that the suit was commenced before an execution against the maker was returned: the *general issue* throws upon the plaintiff the burthen of proving that fact, and the law makes it a prerequisite to his right to recover. *Woodward v. Harbin*. 535.
25. A plea containing matter in abatement and concluding in bar, is bad as a plea in abatement and may be taken advantage of on demurrer. *Banks v. Lewis*. 599.
26. A plea in abatement to a suit commenced by attachment because of a defective affidavit, should set out the affidavit on *oyer*. *Ibid*.
27. Where a bill single is described in the declaration, as made and delivered to the plaintiff, by the name and description of J. D. F. agent for G. A. K. or bearer, the suit is properly brought, and the words agent, &c. will be considered merely as *descriptio persona*. *Castleberry and Collins v. Fennell*. 642.
28. Where personal property is sold with a warranty of title, the vendee cannot maintain an action against the vendor, upon an allegation that his title was defective, unless he has been first charged at the suit of another person, whose right has been adjudged to be paramount, and the judgment has been satisfied, at least in part. A declaration which does not substantially alledge these facts, is demurrable. *Salle v. Wright's Ex'rs, use, &c.* 700.
29. A count in an action on a warranty of title, which alledges that a slave sold by the defendant to the plaintiff, and by the latter to L. had been adjudged to be the

PLEADING—CONTINUED.

property of B. in an action of detinue prosecuted by him against L., does not state a good cause of action. So a count in such case is alike defective which deduces the defendant's liability from the recovery of B. against L., the satisfaction of that judgment, by the latter, his reimbursement by the plaintiffs, and a notice of these facts to the defendant. *Ibid.*

30. To entitle the plaintiff to recover of his vendor on a warranty of the title of personal property, where he had sold the same to L., of whom B. had recovered it, the declaration should allege that the plaintiff was informed of the pendency of the suit against L. in order that he might defend the same; and further, that B's title was superior to the defendant's. *Ibid.*

See *Evidence*, 4.

See *Bills of Exchange and Promissory Notes*, 2.

See *Sheriff and Sureties*, 3, 7.

POWER.

1. An administrator *cum testamento annexo*, who is appointed upon the failure of the executors to qualify, cannot execute a power to sell lands conferred upon the latter by the will. *Lucas v. Doe ex dem Price*. 679.
2. A bond signed in blank may be afterwards filled up in a material part by the express authority of those who are to be bound by it, and will be as valid as if filled up before it was executed—such authority may be by parol. An authority to fill up and perfect the bond is an authority to redeliver it also. *Gibbs & Labuzan v. Frost & Dickinson*. 720.
3. When two or more persons have a common object in view, the declarations of one, in the presence and hearing of all, in furtherance of the common purpose, and uncontradicted by them, must be considered as the declaration of all.—Therefore when L. against whom four judgments had been obtained, and executions issued thereon, went to the Clerk's office with two other persons, as his intended sureties to obtain writs of error to the Supreme Court, and to execute bonds to supersede the executions, which the Clerk commenced preparing by proceeding to fill up the blanks kept in the office for that purpose, when L. interposed, and in the presence and hearing of his sureties, stated that he had not time to wait until the bonds were filed up, and requested that they might be executed in blank, by him and his sureties, which was accordingly done, and a statement handed to L. that the executions were superseded.—Held, that this was an express authority to the Clerk to fill up the blanks in the bond, both on the part of the principal and the sureties. *Ibid.*
4. An authority to perfect a bond by filling it up, given by parol, may be revoked in the same manner, and if revoked before the bond is perfected, the authority to perfect it, is at an end. *Ibid.* 721.

PRACTICE AT LAW.

1. When, in an action of *assumpsit*, the common counts are added to a count on a promissory note, it is allowable to take a judgment by default, without causing a *nolle prosequi* to be entered as to the former; but the judgment in such case must not exceed the amount of the note. *Granberry v. Wellborn, use, &c.* 118.
2. When a writ issues against two and is returned executed upon one, but is silent as to the other, the legal conclusion is that the latter was not served; under such circumstances it is allowable to take a judgment against the party only who is before the Court, and discontinue as to the other. *Ibid.*

PRACTICE AT LAW—CONTINUED.

3. The writ issued in the name of the nominal plaintiff for the use of J. P. H. and in the declaration E. H. was made the beneficial plaintiff: Held, that the party for whose use the suit was brought, being made liable for costs by statute, it was irregular to substitute for him, another name in the declaration, in his stead; and that the objection was available after judgment by default. *Ibid.*
4. The rule of practice which provides that all declarations, &c. shall be signed by counsel, where counsel is employed, if not merely directory, does not make a paper purporting to be a declaration defective, because it is unsigned; unless it appears that the plaintiff was represented by counsel, at the time the declaration was filed. *Furley's Adm'r. v. Nelson.* 183.
5. A declaration in the plaintiff's name, although not signed by him, if placed on file, will be received as such. *Ibid.*
6. When a party dies pending a suit, a *scire facias* to revive it may, by statute, issue at any time to his personal representative. *Ibid.*
7. Under a statute of this State, the service of a *scire facias* is good, though it do not appear that witnesses were present. *Ibid.*
8. It is entirely regular to render a judgment against the personal representative of a deceased defendant at the return term of a *sci. fa.* where it has been executed fifteen days before the Court, and the representative does not appear, make himself a party and claim a continuance. *Ibid.*
9. The act of 1839, which inhibits the rendition of a judgment at the appearance term, applies only to suits commenced by original process, and consequently does not embrace the revival of suits by *scire facias*. *Ibid.*
10. A memoranda written by the presiding Judge across a motion entered on the motion docket, will authorize an entry *nunc pro tunc*, at a succeeding term.—*Harris et al. v. Bradford.* 215.
11. Where a motion is made to exclude *all the testimony* given by a witness, a part of which is admissible, the Court is not bound to distinguish the legal from the illegal evidence, but may overrule the motion *in toto*. *Hrabowski's Ex'rs. v. Herbert, Daniel & Co.* 265.
12. Where a judgment is rendered *de bonis testatoris* when it should have been *de bonis propriis*, it will be reversed and rendered at the cost of the plaintiff in error. *Oliver, Adm'r. v. Hearne and Whitman.* 271.
13. The Court trying a cause may annex as a condition on which a new trial is granted, that the party asking for it, pay costs, or that it be granted, unless the plaintiff remit damages, &c. *Stephenson et al. v. Mansony.* 317.
14. Upon a motion for a new trial submitted by the defendants, the Court made the following order: "The plaintiff is hereby required to remit the one thousand dollars damages assessed by the jury, or a new trial is granted by the Court, on the payment of all costs." In a short time after the Court had adjourned for the term, the defendants paid the costs. At the second term thereafter, the plaintiff moved to strike the cause from the docket, upon his releasing damages—Held, that the costs were paid in due time, but the plaintiff should have elected to enter a *remittitur* at an earlier day, and the cause could not now be dismissed. *Ibid.*
15. Where a cause in which it is proposed to try the right of property under the statute is not placed upon the docket of the Court for several terms after the bond and execution is returned—Held, that the failure of the Clerk to docket it does not operate a discontinuance; and if stricken from the docket, a *mandamus* will be granted to reinstate it. *Wiswall v. Gliddon.* 357.
16. A plaintiff who recovers an erroneous judgment cannot avoid the consequences

PRACTICE AT LAW—CONTINUED.

- of the error, by entering a release in this Court of the damages, in the ascertainment of which the error arose, and leave judgment for the land recovered. *Hollinger v. Smith*. 367.
17. Where the judgment recites that the garnishee had answered at the last term that he was indebted to the defendant, &c., and an answer is copied in the transcript which appears to have been then verified, that answer will be considered by the appellate Court as a part of the record. *Fortune v. The State Bank*. 386.
 18. The appearance of a defendant will dispense with the service of process upon him. *Dearing, Sink & Co. v. Smith & Wright*. 432.
 19. The recital in a judgment that the defendant *says nothing in bar or preclusion of the plaintiff's action*, amounts to the withdrawal of the pleas which he had previously filed. *Ibid*.
 20. The statute having dispensed with proof that individuals suing as a firm were partners, unless the fact is put in issue by plea in abatement; where the making a promissory note is denied, by a party charged as a member of a partnership, the same may be read to the jury without any additional proof, and then its genuineness, or legal obligation, must be shown. *Ibid*.
 21. Where an objection is made to the competency of testimony *en masse*, if part of it is admissible, the Court, without undertaking to distinguish it, may overrule the objection in *toto*. *Ibid*.
 22. When some of the defendants suffer judgment by default, and one of them pleads to issue, no judgment should be entered against the others until the jury have returned their verdict, then it should be entered jointly against all; but if a judgment is rendered against the former, and after verdict a judgment in continuation of the entry, is rendered against the latter, it will be considered as a mere clerical misprision amendable under the act of 1824, "to regulate pleadings a common law." *Ibid*.
 23. Where the judgement entry recites the facts differently from a bill of exceptions certified in the cause; *semble*, the latter will control the former. *Godbold et al v. The Planters and Merchants Bank of Mobile*. 516.
 24. Where a judgment conforms to the verdict on which it is rendered, (though the latter is for too much,) it will not be reversed on error, but a correction should have been sought in the primary Court. *Ibid*.
 25. When a suit is commenced in the name of a person without his consent, and carried on for the benefit of another who claims an interest, the plaintiff on the record is authorized to dismiss the suit unless indemnity is given him against the costs, but the erroneous action of an inferior Court in allowing such a plaintiff to dismiss his suit can only be corrected by *mandamus*. *Brazier v. Tarver*. 569.
 26. It is not erroneous however, to refuse to open the time which has been given in such a case to furnish the indemnity. After the time has expired the discretion of the Court is absolute and will not be controlled. *Ibid*.
 27. The rule that this Court will not reverse a judgment though the Court below may have erred in its charge to the jury, where it is clear from the entire record that the plaintiff cannot recover, is confined to those cases where the matter relied on to affirm the judgment, notwithstanding the error of the Court, is uncontroverted. *Brock et al v. Yongue et al*. 584.

PRACTICE AT LAW—CONTINUED.

28. It is not necessary to enter a formal discontinuance as to those on whom process is not served; by taking judgment against the others, the cause is, in law and in fact, discontinued as to them. *The State v. Hinson, et al.* 671.
29. After verdict in a trial of the right of property it is too late to object that no formal issue was before the jury, the record showing a trial as upon an issue. *Hall v. Dargan.* 696.
- See Court, Charge of, 1, 5.*
- See Statutes, 2.*
- See Landlord and Tenant, 1.*
- See Sheriff and Sureties, 8.*
- See Error and Writ of, 1.*
- See Judgment and Decree, 6.*
- See Pleading, 17.*
- See Ejectment and Trespass to Try Title, 7, 8.*

PRACTICE IN CHANCERY.

1. The Register of a Court of Chancery is bound to furnish the copy of a bill to the defendant, together with the *subpœna*, although the plaintiff may not have paid him his fees therefor. *McRae v. Juzan et al.* 286.
2. Affidavits cannot be read on a motion to dissolve an injunction, in opposition to the answer, except in the case of an injunction to stay waste. *Long & Long v. Brown et al.* 622.
3. An injunction may be dissolved on the answer of one defendant, if he alone is charged with knowledge of the facts. *Ibid.*

PRINCIPAL AND AGENT.

1. The declaration alledged that J. A. C. then Clerk of the steamboat C. for and on behalf of the same, and the owners thereof, made and delivered to, &c. a promissory note, &c.—Held, that this did not amount to an allegation that the note was made under an authority for that purpose; and it could not be intended, from the nature of his employment, that the Clerk was authorized to bind his principals. *Childress et al. v. Miller, use, &c.* 447.
- See Frauds, Statute of, 1.*
- See Evidence, 21, 37.*
- See Witness, 1.*
- See Power, 2.*
- See Bond, 6.*

PROCESS, SERVICE OF.

1. The sheriff returned on the writ "not executed, by order of the attorney,"—Held, that proof that the defendant accepted service of the writ, was sufficient evidence that he had notice that the suit was pending, and to authorize the Court to render judgment. *Boughton v. Spear & Pattison.* 257.
2. The appearance of a defendant will dispense with the service of process upon him. *Dearing, Sink & Co. v. Smith & Wright.* 432.
3. An attachment issued against the estate of Charles G. Miller, William J. Wright and Thomas R. Crews; the writ was indorsed thus—"I do hereby authorize R. Thoro, as my special deputy, to execute the within attachment. 10th February, 1841. M. E. Gary, sheriff, S. C." "Levied on four bags marked T. R. C. also twenty-one bags W. J. W., also fifteen bags marked C. G. Miller, as the

PROCESS, SERVICE OF—CONTINUED.

property of the defendants. *M. E. Gary, S S. C. by R. Thorn, D. S.*" Held, 1. That the Supreme Court must judicially know that Mathias E. Gary was sheriff of Sumter, and that the letters "S. C." are intended to designate that county. 2. That the appointment of the special deputy was regular; and, 3. That the return sufficiently shewed that the property levied on was the defendants. *Miller et al v. McMillan et al.* 527.

See Attachment, 1, 2.

See Amendment, 1.

PUBLIC LANDS, SURVEY OF, &c.

1. The act of Congress of 1820, in respect to the division of fractional sections, is not to be construed as imperative in requiring those that contain more than one hundred and sixty acres, to be so divided in all cases as to make half quarter sections, though its length and breadth admits of the formation of several. *Doe ex dem Brown and Wife v. Hunt and Clements.* 129.
2. Where a patent described the land conveyed by it thus, "the southwest quarter of section twenty-two, &c., containing ninety-two acres and sixty-seven hundredths of an acre, according to the official plot of the survey of the said lands returned to the General Land Office, by the Surveyor General:"—Held, that ninety-two 67-100 acres, as indicated by the subdivision marked on the "official plot," was all that could be claimed under the patent. *Ibid.*
3. The act of 29th May, 1830, confers certain rights of pre-emption, but by its third section, declares all assignments, &c. of the right to be void if made before the patent issues. The supplemental act of the 23d January, 1832, removes the restriction and permits the pre-emptor to assign and transfer his certificate of purchase. The act of 19th January, 1834, revives the first act, and continues its provisions, for the benefit of those entitled to pre-emption, in force for two years, but is silent with respect to the revival of the supplemental act. Held, that a pre-emptor under the act of the 19th January, 1834, was authorized to transfer his certificate of purchase, and may be compelled to transfer the legal title vested in him by the patent, to a purchaser to whom he had assigned the certificate immediately after the entry. And that a purchaser from the pre-emptor, with notice of the assignment, will be compelled to convey the legal title vested in him by conveyance from the pre-emptor, to him who has the equitable right under the assignment of the certificate. *Mann v. Bissent et al.* 731.

RIGHT OF PROPERTY, TRIAL OF.

1. When the Court improperly refuses to dismiss a claim to try the right to property levied on by an execution, and non-suits the plaintiff for his refusal to proceed further in the cause, this is an error sufficient to reverse the judgment. *Leavitt v. Dawson and Friou.* 335.
2. After verdict in a trial of the right of property it is too late to object that no formal issue was before the jury, the record showing a trial as upon an issue. *Hall v. Dargan.* 696.
3. A prior indorser is not entitled to have satisfaction entered upon a judgment against him, when the bill indorsed by him is paid by a subsequent party and the judgment prosecuted for his benefit; but under no circumstances has the claimant, in the trial of a right of property, the right to inquire into the execution. *Ibid.*

See Lien, 3.

ROADS, &c.

1. Any action of the County Court upon a road, as a public road, as by taking an order in reference to it, is *prima facie* evidence that it is a public road established by law. *Oliver v. Loftin.* 219.
2. If a change is made in a public road, and acquiesced in by the public, an overseer of the road would not be authorized to abate it as a nuisance. But when the change is recent, and not justified for the purpose of making it more straight or more convenient for the public, any one may abate it as a nuisance, and it would be the duty of the overseer of the road to remove the obstruction. *Ibid.*

SALE OF CHATTELS.

1. Where a contract was made for the purchase of ninety bales of cotton, part at one price and part at another, all of which had not been weighed, it must be regarded as an entire contract; and if the cotton was destroyed before it was all weighed, the plaintiff is not entitled to recover the price of any part of it. And the willingness of the purchaser to have taken less or more than the plaintiff agreed to sell him, cannot change the character of the contract. *Butre v. Simpson.* 305.
2. Merely sending a delivery order for cotton on a warehouseman to the purchaser without solicitation on his part, all of which is not in a deliverable state, will not in the absence of other proof, transfer the property so as to put the cotton at the purchaser's risk. *Ibid.*
3. A bill of sale in the following words, "Received of Thomas B. Childress, trustee of James Childress, Hubert Childress and Thomas Childress, children of the said Thomas B. Childress, the sum of thirteen hundred and fifty dollars in full for two negro slaves named Sam, twenty-six years of age, and Frank, twenty-two years of age, which I warrant and defend against the claims of all persons whatsoever, and also warrant the said negroes to be sound and healthy, and free from all incumbrance,"—invests the father with the legal title to the slaves. *Beard v. Childress.* 411.

See Execution, Writ of, 8, 9.

See Vendor and Vendee, 12.

SECTION SIXTEEN.

1. The grant of sixteenth sections, by the act of Congress of second March, 1819, is in perpetuity to the inhabitants of the several townships, but the legal title to the land is in the State, in trust for the inhabitants of the respective townships in which the lands lie. *Long & Long v. Brown et al.* 622.
2. A sale of a sixteenth section, pursuant to the act of the Legislature is valid, and binding on the inhabitants of the township. *Ibid.*
3. Whether the acquiescence of the inhabitants of a township in an irregular sale, and receipt of the interest of the purchase money, would not be a waiver of such irregularity—and whether the issuance of a patent would not preclude all inquiry into the regularity of the sale—*Quere. Ibid.*

SET OFF.

1. H. G. H. was indebted to J. M. B. who assigned his accounts to J. A. B. to whom, as assignee, the debtor executed his note for the amount—afterwards H. G. H. paid some notes previously made by J. M. B. as principal and himself as surety:—Held, that these payments did not constitute a set off in an action on the note at the suit of J. A. B. *Holmes v. Bullock.* 228.

SHERIFF AND SURETIES.

1. Where writs of *fiery facias* against the same defendant are at different times placed in the sheriff's hands, who levied them *simultaneously* on all the defendant's property in his reach, but did not sell under either, if the property is only sufficient to satisfy those, the lien of which had first attached, the sheriff is not liable to judgment at the suit of a plaintiff in one of the junior *fi. fa's*, upon a suggestion that the money could have been made thereon by due diligence. *Smith et al. v. Hogan*. 93.
2. Where a *fiery facias* is received by a sheriff, before his term of office expires, and without any action thereon by him, is handed over to his successor, the latter must execute the writ. *Lawson v. Orear*. 156.
3. To an action of trespass against a sheriff, he justified under a *fiery facias*. To this plea the plaintiff replied generally. Held, that under this issue it was not competent for the plaintiff to prove that the goods taken were exempt from execution, but that to admit the proof the plaintiff should have replied these facts by way of confession and avoidance. *Beatty v. Hollaway*. 178.
4. Where a notice to a sheriff and his sureties stated that the plaintiff *did* move for judgment against them for a failure to return an execution, &c. on the eleventh day of the term, which day was four days after the date of the notice—Held, that although the notice was in the past, it was to be understood as referring to a motion to be made in future. *Harris et al. v. Bradford*. 214.
5. In a proceeding against a sheriff and his sureties, if the former only plead, the fact of suretyship must be proved—but if the sureties alone appear and plead, they must put in issue the execution of the official bond, by a plea of *non est factum*, in order to require the plaintiff to prove their suretyship. *Ibid*.
6. It is an available defence for a sheriff, or his sureties, in a summary proceeding against them, for the failure of the former to return an execution, that he had placed it in the hands of a deputy to execute and return, who was prevented by sickness, which disqualified him for such business, from returning the execution—and that the sheriff was absent from the country, having left it when the deputy was able, and expected to, perform the duties of his office. *Ibid*.
7. It is no excuse at law for the failure of a sheriff to return an execution, that the defendant therein was insolvent while the same was in force. *Ibid*.
8. The discontinuance of the notice of a motion for failing to return an execution, as to the sheriff and such of his sureties as have not been served, will not affect a judgment rendered against the other sureties. *Ibid*.
9. The sheriff levied on twenty-five bales of cotton in a warehouse, as the property of J. against whom he had an execution. S. setting up a claim to fifteen bales of the cotton, procured fifteen other bales of cotton, and having obliterated the marks and brands, marked them to resemble the cotton levied on, and substituted them secretly and without force, for fifteen bales of the cotton levied on, which he removed, and on the day of the sale claimed the cotton and forbade the sale—Held, 1st. That if the sheriff elected to receive the substituted cotton for that originally levied on, S. was concluded by his own act from denying that it was not the cotton levied on. 2d. That on a suit by S. against the sheriff for the fifteen bales of cotton, the only question was, whether the property in the fifteen bales levied on was in S. or in the defendant in execution, when the execution came into the sheriff's hands. 3d. When the sheriff levies on property which does not belong to the defendant in execution, the true owner may retake possession, if he can do so without committing a trespass. *Smith v. Locke*. 288.
10. Where an issue is joined upon a suggestion that the sheriff could, with due dili-

SHERIFF AND SURETIES—CONTINUED.

- gence have made the amount of an execution, and a general verdict returned in favor of the plaintiff, the legal inference is, that the jury have affirmed the truth of the facts alledged in the suggestion; and if the suggestion is sufficient, a judgment may be rendered thereon. *Gary et al v. Wood.* 296.
11. Where the service of notice of a suggestion was effected on the sheriff only, and the judgment entry recites that "the defendant came by his attorney," &c. and a judgment is rendered on verdict against "the defendant," the inference is, that the sheriff is the party against whom the recovery is had; and his sureties can't join with him in the prosecution of a writ of error. *Ibid.*
 12. In a summary proceeding under the statute against a sheriff, &c., for failing to return an execution, the plaintiff need not produce the judgment on which it is issued, but the sheriff may resist a recovery, by showing either that there is no judgment or it is void. *Godbold et al v. The Planters and Merchants Bank of Mobile.* 516.
 13. Where a writ of *fieri facias* was placed in the sheriff's hands, on which with due diligence he could have made the money, after its return the defendant in execution paid the plaintiff the amount of the judgment, except costs, and a few days after such payment, made a suggestion under the statute of the sheriff's failure to collect the amount of the execution—*Held*, that as the principal and interest were paid before the suggestion was made, the plaintiff was not entitled to a judgment against the sheriff for the damages allowed by law for the want of diligence. *Willard Freeman & Co. v. Womack.* 539.
See Summary Proceedings, 2; 3.
See Amendment, 2.
See Execution, Writ of, 14, 16.

STATUTES.

1. The statute which requires the Register to certify to the law court the fact that an injunction has been dissolved, is *mandatory* only, and the failure or refusal of the Register to certify the fact, will not prevent the plaintiff at law, from suing out execution on the injunction bond. *Wiswell et al v. Munroe.* 9.
2. Where the plaintiff is twice nonsuited in the progress of the same suit, and the nonsuits are set aside by the Court, this does not affect his right to proceed to judgment. The act of 1807, [Digest 283, §135,] refers to nonsuits suffered in several actions for the same cause. *King v. McLoskey.* 91.
3. The first *proviso* of the last section of the act of the 9th January, 1841, "regulating punishments under the penitentiary system, means this, viz: that they who had committed offences previous to the time when the statute became operative, may be proceeded against, and if found guilty shall receive the punishment *then* imposed by law, notwithstanding its subsequent modification. The second *proviso* is merely affirmative of what the law would be without it; and the exception in that proviso, though badly expressed, was intended to prevent it from so operating as to annul to any extent the act itself. *Lore v. The State.* 173.
4. The act of 1839, which inhibits the rendition of a judgment at the appearance term, applies only to suits commenced by original process, and consequently does not embrace the revival of suits by *scire facias*. *Farley's Adm'r. v. Nelson.* 184.
5. A loan is not an incumbrance within the meaning of the first section of the act of 1823. [Aik. Dig. 207, §4.] *Norris v. Bradford.* 203.

STATUTES—CONTINUED.

6. The act of 1832, [Aik. Dig. 253.] which authorises an execution to issue against the surety of an executor to his official bond upon a return of "no property found," to an execution issued on a decree of a County Court against the executor, was intended to embrace bonds executed prior to its passage, but was not intended to retroact upon decrees of the Orphans' Court rendered prior to the passage of the law. The act is constitutional. *Elliott and Perkins v. Mayfield and Wife.* 417.
 7. Where an act of the Legislature authorized the building of a bridge by means of stock to be subscribed, and after stock to a certain amount was subscribed, authorized the proprietors of a Ferry at the same place to subscribe their interest in the ferry and landings at an amount designated; if the owner of an interest in the ferry, &c., refuse to subscribe it, after the requisite amount of stock was taken, and the bridge is afterwards erected, his heirs cannot come in as stock holders, but will be concluded by the refusal of their ancestor. *White's Heirs v. The President &c. of the Florence Bridge Co.* 461.
 8. No judgment can be rendered in an action brought to recover a penalty by a common informer, after the repeal of the statute giving the penalty, unless some special provision for that purpose be made by statute. *Pope v. Lewis.* 487.
 9. The statute which exempts certain property from execution for the benefit of every family in this State, does not cover the property of one who has a family in another State, although he is here accompanied by a son, not shown to be dependant upon him. *Allen v. Manasse and Moseley.* 554.
- See Dover,* 1.
See Execution, Writ of, 3, 4.
See Garnishee, 1.
See Deed and Registration of, 1, 9, 10.
See Criminal Cases and Proceedings in, 3, 4, 5.
See Ejectment and Trespass to Try Title, 1.
See Practice at Law, 22.
See Pleading, 23.
See Indorsement, 3.
See Bank, 3.
See Attorney at Law, 11.
See Attachment, 6.

SUMMARY PROCEEDINGS.

1. When a summary judgment is authorized upon a bond, the same construction is to be given to the bond as would be if the recovery was sought by suit. *Quinn et al v. Adair.* 315.
2. No summary proceedings by motion can be sustained against a sheriff and his securities for failing to return a writ of *capias ad respondendum*. The act of 1821, requiring sheriffs to return all writs and executions three days before the term to which they are returnable, does not impose any new penalties, and none but the common law liabilities then existed for failing to return an ordinary writ. *Sample et als. v. Royall.* 344.
3. In a summary proceeding against a sheriff and his sureties, for the failure of the former to return a writ of *feri facias*, the notice stated that a judgment would be moved for against them, for the amount of the judgment against the defendant in execution: Held, that the substitution of the word "judgment" for "execution," was not fatal to the notice, and would be considered good under the

SUMMARY PROCEEDINGS—CONTINUED.

act of 1819—*further*, that after verdict and judgment, none other than substantial defects can be made to the notice. *Godbold et al v. The Planters and Merchants Bank of Mobile.* 516.

See Bank, 1.

See Sheriff and Sureties, 12.

SUNDAY.

See Attachment, 1, 2.

SUPERSEDEAS.

1. An execution may be superseded if an unjust or improper use is attempted to be made of it, although the execution be authorized by the judgment. *Lockhart et al v. McElroy.* 572.

2. Where two judgments exist for the same debt, the payment of one is a satisfaction of both ; and the attempt to coerce the payment afterwards, by execution, is an abuse of the process of the Court, which may be arrested by supersedeas. *Ibid.*

3. A blank writ of error bond will not operate as a supersedeas to the execution. *Gibbs & Labuzun v. Frost & Dickinson.* 721.

See Judgment, 1.

See Chancery, 1.

See Lien, 2.

SURETIES.

1. A surety who pays a debt for his principal, is entitled to stand in the place of the creditor as to all securities, funds, liens and equities, which he may have against other persons or property on account of the debt. *Brown v. Lang et al.* 50.

2. A surety who is fully indemnified by the principal debtor against loss, cannot avail himself, in a suit against him by the creditor, of the defence that the creditor had given time to the principal debtor, without his consent, and that he was thereby discharged. *Chilton and Price v. Robbins, Paynter & Co.* 223.

3. The surety of a County Treasurer, on his official bond, is bound for the monies of the county in the hands of the Treasurer, at the time of the execution of the bond, although a previous bond then existed with different sureties. But if the money had been wasted by the Treasurer, or appropriated to his own use, before the execution of the last bond, the sureties on the first bond would alone be responsible. *Townsend and Gordon v. Everett, use, &c.* 607.

4. The surety of a County Treasurer, to his official bond, is bound by those acts of the Treasurer which by law, as Treasurer, he is required to perform—the annual settlements, therefore, of the County Treasurer, and the statement to his successor in office of the amount of public money in his hands, being acts which by law, as treasurer, he was required to perform, are evidence against his surety in an action against him on the official bond of the Treasurer. *Ibid.*

5. When a creditor receives a note from his debtor with other persons as security, and the note is made payable to a Bank, under the expectation that it will be discounted, the securities are not discharged by the refusal of the Bank to discount it, but the creditor may sue in the name of the Bank, or transfer the note to another, who may in like manner use the name of the Bank to collect the money. *The Planters and Merchants Bank, use, &c. v. Blair & Morroh.* 613.

SURETIES—CONTINUED.

6. The surety of an administrator in the absence of fraud is concluded by the settlement of his principal with the Orphans' Court. *Williamson v. Howell et al.* 693.
7. The omission of an administrator to bring forward at the settlement of the estate, charges against it which he might have preferred, will not authorize the surety to have a re-settlement of the estate in chancery, although the administrator may be insolvent. *Ibid.*
See Chancery, 8.
See Criminal Cases and Proceedings in, 9.

TRUST AND TRUSTEE.

1. Where a deed made to secure a surety to a debt in bank, payable by instalments, provided that if the trustee named in the deed should fail or refuse to act, that the *cestui que trust* might appoint another to act in his stead—and the trustee in the deed failing to act, upon the happening of the first default, an appointment was made of a trustee who took possession of the trust estate, but the instalment being paid re-delivered the property to the makers of the deed, and upon the happening of another default, another person was appointed trustee, who took possession of the property and sold according to the terms of the deed—Held,
 1st. That the power was not exhausted by the first appointment.
 2d. That as the deed did not require such appointment to be in writing, and the property to be sold under the deed was personal property, the appointment might be made by parol. *Foster v. Goree.* 440.
2. *Semble*—Where property is conveyed in trust, with a power of sale, the directions of the deed as to the manner of the sale must be pursued. *Chambers et al v. Mauldin et al.* 477.
3. The powers of a trustee over the trust property depend upon the nature of the trust and the terms employed in its creation; and if not restricted, a trustee with a power of sale, may maintain *detinue* to recover the possession of personal property, and cannot, under ordinary circumstances, resort to Chancery for that purpose. *Ibid.*
4. The grantor of slaves conveyed by deed, in trust for the payment of a debt, with a power of sale, is not liable for hire so long as he is permitted to retain their possession; but if he transfer the possession to a third person, that person, after a demand of him by the trustee entitled to the possession, will be accountable for hire. *Ibid.*
5. Where a *cestui que trust* takes possession of slaves conveyed for the security of a debt due, he becomes liable to account for their hire; but where one purchases the interest both of the grantor and *cestui que trust*, and acquires the possession, he may elect to hold under the grantor; and thus avoid the payment of hire accruing previous to the time he was called on by a junior incumbrancer, to direct a sale under his deed. *Ibid.*
6. When a claim is interposed by a trustee, for the wife, the husband is not a competent witness. *Hall v. Dargan.* 696.
See Sale of Chattles, 6.

USURY.

1. The offence of usury is not complete so as to enable a common informer to sue for the penalty given by the statute until the money, &c. has been taken, accepted or received. *Upson v. Austin.* 124.

USURY—CONTINUED.

2. Where there are two defendants and one pleads usury, the other defendant cannot be compelled, against his will, to be examined as a witness, under the statute to prove the usury. *Bolling & James v. Logan.* 169.

VENDOR AND VENDEE.

1. This right exists until the contract of the parties is determined by its execution on the part of the vendor, and when the conveyance has been executed by all the necessary parties, then the rule of *caveat emptor* applies with its utmost rigor. If the purchaser is afterwards evicted by a title to which his covenants do not extend, he is without relief, either in law or equity. *Cullum v. The Branch of the Bank of the State of Alabama at Mobile.* 21.
2. When a purchaser is evicted by a title covered by his covenants of warranty, this eviction cannot be called a failure of consideration, nor is it available as a defence *at law*, to an action for the price of the land. And the reason is, that a court of law cannot do complete justice between the parties, by placing them in *statu quo.* *Ibid.*
3. In all cases of purchase there is a trust and confidence reposed by the purchaser in the vendor, that the estate is not impaired in value or incumbered by any act done by him; and by offering to sell, he virtually represents it as not incumbered by himself, or if it is, that he will free it before the sale is executed. *Ibid.*
4. There are cases in which the mere concealment of an incumbrance, has been held no ground to rescind the contract, when the incumbrance is removed before the hearing, but these cases rest upon the principle that no injury has resulted to the purchaser. *Ibid.*
5. It seems that when the occupation has been of any value to the purchaser, the vendor, upon the rescission of the contract, will be entitled to interest on the purchase money, as a remuneration for the occupation from the time of the purchase until the offer to rescind, and until the abandonment. *Ibid.*
6. The purchaser has the right, when an incumbrance has been concealed from him, to require a prompt removal of it; and if this is not effected he is entitled to seek a rescission of the contract, and may abandon the possession, unless he chooses to retain it as a trust fund to reimburse himself for money paid. And the effect of retaining the possession until a decree for rescission, will be only to charge the purchaser with interest on the purchase money, if the possession is of any value. *Ibid.*
7. The fact that a covenant covering the eviction was entered into by the vendor, will not prevent the purchaser from insisting on the fraud, in order to rescind the contract. *Ibid.*
8. The circumstance that the incumbrance could have been removed by the payment of a sum greatly less than that remaining due for the purchase money, is no answer to the claim for rescission, on the ground of fraud, as it is the vendor's duty even in the case of warranty, to protect the possession of the purchaser at all hazards, or to suffer the consequences. *Ibid.*
9. A contract for the sale and conveyance of land, evidenced by a bond, conditioned to make title at a future day, invests the purchaser with the right of entry; and though he has never taken actual possession, he cannot, on that ground, resist the payment of a promissory note, given for the purchase money. *Reid v. Davis.* 83.
10. A vendee of land may, after the expiration of the time within which the vendor

VENDOR AND VENDEE—CONTINUED.

- has undertaken to make a title, demand the same and tender the purchase money, and if the vendor fails to perform his contract, by abandoning the possession he may rescind the contract of purchase. But the demand of the deed and offer to return the bond to the vendor, will not operate a rescission, unless there be something in the form of the contract making this sufficient. *Ibid.*
11. One who has made a parol contract for the purchase of land, paid one half the purchase money, and retains the uninterrupted possession, cannot maintain an action against the vendor for the recovery of the money received by him. *Cope v. Williams*: 362.
 12. Where personal property is sold with a warranty of title, the vendee cannot maintain an action against the vendor, upon an allegation that his title was defective, unless he has been first charged at the suit of another person, whose right has been adjudged to be paramount, and the judgment has been satisfied, at least in part. A declaration which does not substantially allege these facts, is demurrable. *Salle v. Wright's Ex'rs, use, &c.* 700.
 13. In an action by the vendee of personal property against the vendor upon a warranty of title, a judgment against the vendee at the instance of a third person, claiming to be the rightful owner, of which suit the vendor had no notice, is not evidence to prove that the title of the latter was defective. But it seems, that such judgment is admissible to prove the amount of damages recovered; and is conclusive of the invalidity of the vendor's title, if it was obtained without fraud or collusion, upon notice given to him of the pendency of the action. *Ibid.*
 14. The measure of damages in an action for a breach of a warranty of title on the sale of personal property, cannot exceed the damages sustained by the vendee. *Ibid.*
See Chancery, 5, 6, 24, 30.
See Fraud, 2.
See Pleading, 29, 30.
See Public Lands, 3.

VERDICT.

1. After verdict in a trial of the right of property it is too late to object that no formal issue was before the jury, the record showing a trial as upon an issue. *Hall v. Dargan*.
2. The omission of the jury to insert in their verdict the sir-name of the defendant in execution, is wholly immaterial, as the entire sentence could be struck from the verdict without impairing its effect; if necessary the name would be supplied by intendment. *Ibid.*

WILL AND PROBATE OF.

1. The statute is explicit in requiring the next of kin to be informed of an application for the probate of the will of a deceased relative, and only allows it to be heard and determined without notice, where there is no kindred resident in the State; and a revising Court will not intend that the next of kin are non residents in the absence of any statement or proof to that effect in the record. *Shields et al v. Alston.* 248.
2. The recital in the record in respect to the admission of a will to probate, that "due and proper notice was given to the next of kin of the testator," will not authorize the conclusion that one of the next of kin then in his minority, had

WILL AND PROBATE OF—CONTINUED.

- been legally notified, or waived notice—there being no notice in the record, and he being incompetent to dispense with it. *Ibid.*
3. Where a paper is propounded for probate as a will, and the parties interested in defeating it, produce a testamentary paper of a later date, it is the duty of the Orphan's Court, under the statute of this State, *mero motu* to cause proceedings to be instituted for the purpose of trying the validity of the latter, and determining whether it shall operate as the testator's will. And the Court cannot assume that the first paper has never been revoked, because the second has not been formally offered for probate. *Ibid.*
 4. The act of 1806, makes a legatee a competent witness to establish a will by declaring his legacy to be void. *Perkins v. Windham.* 634.
 5. A devise to a parent for life, and afterwards to his or her children, is not avoided as it respects the parent, by the children proving the will as subscribing witnesses; though the latter cannot claim their residuary interest under the will.—*Ibid.*

WITNESS.

1. An agent who purchases goods for his principal, which are, without the consent of the agent, seized by the sheriff, by virtue of an execution against the agent, in favor of a third person, and sold to satisfy the judgment, is a competent witness in a suit by the principal against the sheriff for the trespass. *Bush v. McGee.* 710.

See Usury, 2.

See Forcible Entry and Detainer, &c.





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